



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



HARVARD LAW LIBRARY



Jul 5

43

REPORTS OF CASES
DETERMINED IN THE
SUPREME COURT
OF THE
STATE OF COLORADO,

CONTAINING

ALL OF THE CASES DETERMINED AT THE JANUARY TERM,
1890 (EXCEPT THREE CASES PENDING ON MOTIONS FOR
REHEARING), AND A PORTION OF THE CASES
DETERMINED AT THE APRIL TERM, 1890.

By WILLIAM E. BECK.

VOL. XIV.

Q11-11-2

CHICAGO:
CALLAGHAN & COMPANY, PUBLISHERS.
1890.

Entered according to the Act of Congress, in the year 1891,
By JAMES RICE, SECRETARY OF STATE,
In the Office of the Librarian of Congress, at Washington, D. C.

Rec. Feb. 26, 1891.

STATE JOURNAL PRINTING COMPANY,
PRINTERS AND STEREOTYPERS,
MADISON, WIS.

JUSTICES OF THE SUPREME COURT

OF THE

STATE OF COLORADO.

JOSEPH C. HELM, CHIEF JUSTICE.

VICTOR A. ELLIOTT, }
CHARLES D. HAYT, } ASSOCIATE JUSTICES.

SUPREME COURT COMMISSIONERS.

GILBERT B. REED. GEORGE Q. RICHMOND.

ALBERT E. PATTISON.¹

SAMUEL W. JONES, ATTORNEY-GENERAL.

JAMES A. MILLER, CLERK.

¹ Resigned April 9, 1890, and Hon. JULIUS B. BISSELL appointed by the governor to fill the vacancy April 15, 1890.

TABLE OF CASES REPORTED.

A.		Conway v. John	80
Abernathy, Sickman v.....	174	Cook v. Doud.....	488
Adams, Gilpin v.....	512	Coors v. German Nat. Bank..	202
Armor v. Spalding.....	302	Corning, Moffatt v.....	104
Arnold v. Woodward.....	164	Corrigan v. Jones.....	811
Atchison v. Graham.....	217	County Court, Schwarz v.....	44
Ayres v. Shields.....	475	Crane v. Farmer.....	294
B.		Cross v. Kistler.....	571
Bachman v. O'Reilly	433	D.	
Ballard, McKenzie v.....	426	D. & S. F. R'y Co. v. School	
Bates v. Wilson.....	140	Dist	827
Baur v. Beall.....	383	Denver, U. & P. R'y Co., Bra-	
Beall, Baur v.....	383	honey v.....	27
Beaton v. Wade.....	4	De Votie v. McGerr.....	577
Bernheimer v. City of Lead-		Diamond T. & M. Co. v. Faulk-	
ville.....	518	ner	488
Blanchard, Straat v.....	445	District Court, People ex rel.	
Board of Com'rs, Lewis v.....	371	Rucker v	896
Bond, Martin v.....	466	Doud, Cook v.....	483
Bowles, Colo. Mid. R'y Co. v.	85	E.	
Brahoney v. Denver, U. & P.		Empire L. & C. Co. v. Engley	289
R. Co.....	27	Engley, Empire L. & C. Co. v.	289
Breene, In re.....	401	Eureka G. M. Co. Hunt v.....	451
Brooks v. People.....	413	F.	
Brunk, Smith v.....	75	Farmer, Crane v.....	294
Burke, Fitzgerald v.....	559	Faulkner, Diamond T. & M.	
Burns, O'Reilly v.....	7	Co. v.....	488
Butler v. Rockwell.....	125	Finding v. Hartman	596
C.		First Nat. Bank, Hamill v....	1
Campbell v. Shiland.....	491	First Nat. Bank v. Hummel..	259
Cannon and Dounce v. Will-		Fitzgerald v. Burke.....	559
iams.....	21	Ford v. Roberts.....	291
Carpenter, Castagno v.....	524	G.	
Carpenter, Williams v.....	477	German Nat. Bank, Coors v..	202
Castagno v. Carpenter.....	524	Gilpin v. Adams.....	512
Cavanaugh, McQuown v.....	188	Graham, Atchison v..	217
City of Central, Huer v.....	71		
City of Leadville, Bernheimer			
v.....	518		
Clanton v. Ryan	419		
Colo. M. R'y Co. v. Bowles...	85		

Great West M. Co. v. Wood-	
mas of A. M. Co.	90
Greeley Ir. Co. v. House.....	519
Gregg, Lovelock v.	53
Griffin, Smith v.	429
Groves, McMichael v.	510
Guldager v. Rockwell.....	459
Gutshall v. Helm.....	543

H.

Hallack v. Stockdale.....	193
Hamill v. First Nat. Bank....	1
Hamill v. Ward.....	277
Hamm, Jackson v.	58
Harrington v. Smith.....	376
Hartman, Finding v.....	596
Hawthorne, Wilson v.....	530
Hax, Seaman v.	536
Heinssen v. State.....	228
Helm, Gutshall v.....	543
Horner, State Ins. Co. v.....	391
House, Greeley Ir. Co. v.....	549
Huer v. City of Central.....	71
Hummel, First Nat. Bank v..	259
Hunt v. Eureka G. M. Co.....	451
Hurd v. McClellan.....	213
Hurd v. People.....	207

I.

In re Breene.....	401
In re Rogers.....	18

J.

Jackson v. Hamm.....	58
John, Conway v.....	30
Johns, Wier v.....	493
Johnson v. Mitchell.....	227
Jones, Corrigan v.....	311
Jones, Nichols v.....	61
Jordan v. McNulty.....	280

K.

Karcher v. Pearce.....	557
Keith v. Wells.....	321
Kistler, Cross v.....	571

L.

Laclede F. M. Co. v. Williams	37
Law v. Nelson.....	409
Lewis v. Board of Com'rs.....	371
Lovelock v. Gregg.....	53

M.

Martin v. Bond.....	466
McClellan, Hurd v.....	213
McClure v. Smith.....	297
McDonald, Silver Cord C. M.	
Co. v.....	191
McGerr, De Votie v.....	577
McKenzie v. Ballard.....	426
McKenzie v. McMillen.....	50
McManus, Patrick v.....	65
McMichael v. Groves.....	540
McMillen, McKenzie v.....	50
McNulty, Jordan v.....	230
McQuown v. Cavanaugh.....	188
Meagher v. Reed.....	335
Mitchell, Johnson v.....	237
Moffatt v. Corning.....	104
Morey, Stocking v.....	817
Musgrave, Rico R. & M. Co. v.	79

N.

Nelson, Law v.....	409
Nichols v. Jones.....	61

O.

O'Reilly, Bachman v.....	433
O'Reilly v. Burns.....	7
O'Reilly, Robertson v.....	441

P.

Palmer, Stevenson v.....	565
Parker, Town of Longmont v.	336
Patrick v. McManus.....	65
Pearce, Karcher v.....	557
People, Brooks v.....	413
People, Hurd v.....	207
People ex rel. Rucker v. Dis-	
trict Court.....	396
People, Thomas v.....	254
Pleyte v. Pleyte.....	593

R.

Reed, Meagher v.....	335
Rico R. & M. Co. v. Musgrave.	79
Riley v. Riley.....	290
Roberts, Ford v.....	291
Robertson v. O'Reilly.....	441
Rockwell, Guldager v.....	459
Rockwell, Butler v.....	125
Rogers, In re.....	18
Rohm, Simonton v.....	51
Ryan, Clanton v.....	419

TABLE OF CASES REPORTED.

vii

S.	T.
Sauer v. Town of Nevadaville 54	Taylor, State Ins. Co. v. 499
School District, Denver & S. F. R'y Co. v. 327	Thomas v. People. 254
Schwarz v. County Court. 44	Todd v. Stewart. 286
Seaman v. Hax. 536	Town of Nevadaville, Sauer v. 54
Shields, Ayres v. 475	Town of Longmont v. Parker 386
Shiland, Campbell v. 491	W.
Sickman v. Abernathy. 174	Wade, Beaton v. 4
Silver Cord M. Co. v. McDon-ald. 191	Ward, Hamill v. 277
Simonton v. Rohm. 51	Wells, Keith v. 321
Smith v. Brunk. 75	Wendling C. & L. Co. v. Woodburn. 544
Smith v. Griffin. 429	Wier v. Johns. 493
Smith, Harrington v. 376	Williams, Cannon and Dounce v. 21
Smith, McClure v. 297	Williams v. Carpenter. 477
Spalding, Armor v. 302	Williams, Laclede F. M. Co. v. 37
State, Heinssen v. 228	Wilson, Bates v. 140
State Ins. Co. v. Horner. 391	Wilson v. Hawthorne. 530
State Ins. Co. v. Taylor. 499	Woodburn, Wendling C. & L. Co. v. 544
Stevenson v. Palmer. 565	Woodmas of A. M. Co., Great West M. Co. v. 90
Stewart, Todd v. 286	Woodward, Arnold v. 164
Stockdale, Hallack v. 198	
Stocking v. Morey. 317	
Straat v. Blanchard. 445	

LIST OF CASES CITED.

A.

Abbott v. Refining Co. 4 Neb. 416	157	Bank of Metropolis v. N. E. Bank, 6 How. 213.....	206
Allen v. Center Val. Co. 21 Conn. 180.....	183	Bank v. Newton, 18 Colo. 245	141
Allen v. Huntington, 16 Am. Dec. 702.....	103	Barker v. Foster, 29 Minn. 166	69
Allen v. Patterson, 7 N. Y. 476	492	Barnard v. McKenzie, 4 Colo. 251	23, 25, 27, 81
Allenspach v. Wagner, 9 Colo. 127.....	411	Bartlett v. Pearson, 29 Me. 9	61
Allis v. Day, 14 Minn. 516 (Gilm. 386).....	486	Bassett v. Inman, 7 Colo. 270	275
Allison v. Perry, 22 N. E. Rep. 492.....	865	Bassinger v. Spangler, 9 Colo. 175.....	223, 599
Ames v. Insurance Co. 14 N. Y. 258.....	506	Batchelder v. Moore, 42 Cal. 412	258
Anderson v. Sloan, 1 Colo. 33	801	Bates v. Wilson, 14 Colo. 140	209
Andre v. Jones, 1 Colo. 489	489	Beatty v. Fishel, 100 Mass. 448	184
Arnold v. Woodward, 4 Colo. 249	166-69	Bebee v. Ins. Co. 25 Conn. 51	506
Association v. Cory, 129 Mass. 435	33	Becker v. Pugh, 9 Colo. 589.	454, 456
Attwood v. Small, 6 Clark & F. 356.....	96	Beckett v. Railway Co., L. R. 8 C. P. 82.....	389
Austin v. Burgett, 10 Iowa, 302	568	Beeson v. McConnaha, 12 Ind. 420	69

B.

Bachman v. People, 8 Colo. 473	433	Behrens v. Railway Co. 5 Colo. 400	462
Bacon v. Bassett, 19 Wis. 54.	84	Behymer v. Nordloh, 12 Colo. 352.....	84
Baker v. Neff, 78 Ind. 63....	153	Behymer v. Cook, 5 Colo. 399	381
Ball v. Fulton Co. 31 Ark. 379	492	Bell v. Williams, 1 Head, 229	534
Bank v. Cutler, 49 Me. 315....	33	Bennett v. The People, 30 Ill. 359	248
Bank v. Gridley, 91 Ill. 457. 83,	84	Bequillard v. Bartlett, 19 Kan. 382.....	473
Bank v. Jacobs, 10 Mich. 349	301	Bigelow v. Gregory, 73 Ill. 197	157
Bank v. King, 57 Pa. St. 202.	269	Bird v. Morrison, 12 Wis. 133	362
Bank v. McClelland, 9 Colo. 608	206	Bishop v. Trustees of Hart, 28 Vt. 75.....	177
Bank of Metropolis v. N. E. Bank, 1 How. 234.....	206	Bissell v. Foss, 114 U. S. 252, 260	854
		Bissell v. Harrington, 18 Hun, 81	365
		Blackburn v. Sweet, 38 Wis. 578.....	413
		Bonnell v. Chamberlain, 26 Conn. 487.....	464

Bopp v. Fox, 63 Ill. 540.	365	Coal Co. v. Henler, 84 Ill. 126	196,
Bostwick v. Skinner, 80 Ill. 147.	314		197
Brinley v. Insurance Co. 11 Metc. 195.	511	Cole v. Green, 21 Ill. 104.	380
Brooks v. Jacksonville, 1 Scam. 568.	440	Cole v. McGlathry, 9 Me. 181	498
Brown v. Berry, 3 Dall. 365.	235	Collins v. Davidson, 19 Fed. Rep. 83.	196
Brown v. Spofford, 95 U. S. 474.	206	Colt v. Partridge, 7 Metc. 575	173
Brown v. Lewis, 10 Ind. 232	68	Conner v. Carpenter, 28 Vt. 237.	136
Brown v. State, 79 Ga. 324.	409	Connor v. Estate of Connor, 4 Colo. 74.	21
Bryant v. Young, 21 Ala. 264	299	Cook v. Mann, 6 Colo. 21.	223, 886, 599
Buckley v. Lowry, 2 Mich. 418.	47	Coon v. Rigden, 4 Colo. 275.	326
Bunnell v. Taintor, 4 Conn. 563.	367	Corbett v. Eno, 13 Abb. Pr. 65.	69

C.

Canal Co. v. Bright, 8 Colo. 144.	405	Corby v. Burns, 36 Mo. 194.	801
Cannon v. Williams, 14 Colo. 21.	81	Courson v. Browning, 78 Ill. 209.	401
Case v. Beauregard, 99 U. S. 119.	179, 180	Coward v. Clanton, 21 Pac. Rep. 359.	366
Case v. Steele, 34 Kan. 90.	571	Crane v. Farmer, 14 Colo. 294	302
Casgrave v. Howland, 24 Cal. 457.	47	Crary v. Barber, 1 Colo. 172.	412
Cass v. Davis, 1 Colo. 43.	19, 20	Crater v. McCormick, 4 Colo. 196.	532
Cates v. Mack, 6 Colo. 401.	411, 448	Crawford v. White, 17 Ia. 560	534
Chadsey v. Lewis, 1 Gilm. 153	61	Crawshaw v. Maule, 1 Swanst. 495.	354
Chapman v. Shattuck, 8 Gilm. 49.	61	Crouch v. Parker, 56 N. Y. 597	562
Charles v. Eshleman, 5 Colo. 107.	6, 354	Curry v. Hinman, 8 Gilm. 90	440
Chester v. Dickerson, 54 N. Y. 1.	364		
Chickering v. Hatch, 3 Sum. 474.	301		
Child v. Gratiot, 41 Ill. 357.	815		
Christ v. People, 3 Colo. 394	255		
City of St. Antonio v. Gould, 84 Tex. 40.	409		
City of Denver v. Bayer, 7 Colo. 113.	389		
City of Denver v. Capelli, 8 Colo. 235.	428		
City of New Orleans v. Finnerly, 27 La. Ann. 681.	57		
City of Pekin v. Newell, 26 Ill. 320.	554, 556		
Clare v. People, 9 Colo. 122.	404, 405		
Clark v. Taylor, 68 Ala. 453.	3		
Clodfelter v. Cox, 1 Sneed, 330.	60		
Close v. Glenwood Cemetery, 107 U. S. 466.	158		

D.

Dale v. Hamilton, 5 Hare, 369	363
Dallas v. Redman, 10 Colo. 297	404
Daniels v. Miller, 8 Colo. 542	210
Darrow v. People, 8 Colo. 417	250
Davis v. Estey, 8 Pick. 475.	815
Davis v. State, 33 Ga. 98.	490
Decker v. Myles, 4 Colo. 558	458
Deutsch v. Wiggins, 1 Colo. 299.	535
Denny v. Insurance Co. 13 Gray, 492.	506
De Walt v. Hartzell, 7 Colo. 602.	558
De Witt v. Smith, 63 Mo. 263.	23
Dickinson v. Lee, 106 Mass. 557.	498
Dickinson v. Valpy, 10 Barn. & C. 128.	854
Ditch Co. v. Anderson, 8 Colo. 131.	558
Doe v. Baytup, 30 E. C. L. 105	173
Donelson v. Inhabitants of Colerain, 4 Metc. 430.	57
Donohue v. Woodbury, 6 Cush. 148.	465

LIST OF CASES CITED.

xi

Dorr v. Clark, 7 Mich.	310...	571
Dorsey v. Barry, 24 Cal.	449.	47
Dorsey's Appeal, 72 Pa. St.	192	409
Doubleday v. Newton, 9 How.		
Pr. 71.....		284
Doyle v. Mizner, 42 Mich.	832	157
Drum v. Whiting, 9 Cal.	422.	65
Duggan v. Investment Co. 11		
Colo. 113.....		158
Dunlap v. Epler, 88 Ill.	82....	222
Dunn v. Ghost, 5 Colo.	184...	529
Durant v. Rogers, 87 Ill.	508..	6
Durkee v. City of Janesville,		
26 Wis. 697.....		409
Duryea v. Burt, 28 Cal.	569..	854,
		855, 367
Duryea v. Traphagen, 84		
N. Y. 652.....		401

E.

Eames v. Insurance Co. 94		
U. S. 621.....		507
Eastman v. Avery, 28 Me.	248	135
Eaves v. Henderson, 17 Wend.		
190.....		8
Eckhart v. State, 5 W. Va.		
515.....		251
Eckles v. Booco, 11 Colo.	522.	296
Edwards v. R. R. Co. 13 Colo.		
59.....		405
Eilenberger v. Insurance Co.		
89 Pa. St. 464.....		505
Elliot v. Threlkeld, 16 B. Mon.		
341.....		61
Elliott v. Porter, 5 Dana,	299.	561
Ellis v. Hutchinson, 70 Mich.		
154.....		409
Enfield v. Colburn, 63 N. H.		
218.....		498
Ernest v. Vivian, 83 Law J.		
Ch. 517.....		96
Essex v. Essex, 20 Beav.	442	864
Eureka Case, 4 Sawy.	302....	457
Ex parte Curtis, 8 Minn.	274	257
Ex parte Dale, L. R. 11 Ch.		
Div. 772.....		268
Ex parte Stout, 5 Colo.	509	244,
		252

F.

Fairchild v. Fairchild, 64 N. Y.		
471.....		365
Faribault v. Hulett, 10 Minn.		
88 (Gil. 15).....		49
Fechheimer v. Trounstiene,		
12 Colo. 232.....		290

Fereday v. Wightwick, 1		
Russ. & M. 45.....		854
Fergus v. Tinkham, 88 Ill.	407	532
Finerty v. Fritz, 6 Colo.	136	190
First Parish v. Stearns, 21		
Pick. 148.....		288
Fiske v. Carr, 20 Me.	301....	33
Fitzpatrick v. Flannagan, 106		
U. S. 648.....		179, 181
Flake v. Carson, 83 Ill.	518..	418
Forster v. Hale, 5 Ves. Jr.	308	363
Freas v. Engelbrecht, 8 Colo.		
377.....		542
Friedley v. Hamilton, 17		
Serg. & R. 70.....		299
Fuller v. Crittenden, 23 Am.		
Dec. 864.....		464
Fuller v. Placer Co. 5 Colo.		
123.....		439, 440
Funk v. Staats, 24 Ill.	632..	222, 223

G.

Gaffney's Assigns v. Signaigo,		
1 Dill. 158.....		300
Gale v. James, 11 Colo.	540..	492
Gandy v. State, 13 Neb.	445..	258
Garretson v. County of Santa		
Barbara, 61 Cal. 54.....		49
Gass v. Williams, 46 Ind.	253	568
Gassett v. Bogk, 7 Mont.	585	805
Gibson v. Seymour, 4 Vt.	518	801
Gilman v. Williams, 7 Wis.		
287.....		381
Glenn v. Gill, 2 Md. 1.....		188
Gomer v. Chaffee, 5 Colo.		
383.....		319, 320
Gostorfs v. Taafe, 18 Cal.	386	69
Grace v. Insurance Co. 109		
U. S. 278.....		392
Grannis v. Hooker, 29 Wis.	65	492
Graves v. Maguire, 6 Paige		
Ch. 379.....		211
Gray v. Perkins, 12 Smedes &		
M. 622.....		568, 570
Gray v. Palmer, 9 Cal.	616-639	367
G. S. L. & P. R. R. Co. v.		
Harris, 13 Colo. 226.....		23, 27
Great West Mining Co. v.		
Woodmas of Alston Min.		
Co. 12 Colo. 46.....		483, 533, 562
Griffin v. Wall, 32 Ala.	149..	47
Grimes v. Byrne, 2 Minn.	72	474

H.

Hagan v. Lucas, 10 Pet.	401	567, 570
Hahn v. Kelly, 34 Cal.	391...	108
Haines v. Backus, 4 Wend.	218	50

LIST OF CASES CITED.

xiii

Jones v. Johnson, 8 Watts & S. 276.....	136
Jones v. Peasley, 8 G. Greene, 52	568

K.

Kahn v. Smelting Co. 102 U. S. 641.....	354
Kane v. Parker, 4 Wis. 123	285
Kaufman v. Mining Co. 105 Pa. St. 541	71
Kayser v. Maugham, 8 Colo. 232	356
Keith v. Wells, 14 Colo. 321.	544
Keller v. Chapman, 84 Cal. 635.....	49
Kennedy v. Green, 8 Mylne & K. 722.....	498
King v. Stewart, 48 Iowa, 384	71
Kinney v. Mining Co. 4 Sawy. 447.....	98
Kistner v. Sindlinger, 83 Ind. 114.....	183
Klein v. Horine, 47 Ill. 430..	184
Knatchball v. Hallett, L. R. 13 Ch. Div. 696.....	269
Knight v. Houtalling, 85 N. C. 17.....	490
Knoth v. Barclay, 8 Colo. 300	89
Knott v. Knott, 6 Or. 142...	367
Knox v. McFerran, 4 Colo. 348.....	595

L.

Lamar v. Hale, 79 Va. 147...	354
Lance's Appeal, 112 Pa. St. 456.....	804, 805
Larned v. Hudson, 57 N. Y. 151.....	169
Law v. Nelson, 14 Colo. 409..	444, 446, 450
Leas v. James, 10 Serg. & R. 307	136
Le Breton v. Peirce, 1 Am. Law Reg. (N. S.) 88.....	123
Leeper v. Hersman, 58 Ill. 218	571
Lemen v. Robinson, 59 Ill. 115.....	222
Lewis v. Dubose, 29 Ala. 219	557
Lewis v. Greider, 51 N. Y. 231	562
Liddicoat v. Treglown, 6 Colo. 47.....	21
Linn v. Butler, 8 Colo. 355..	126
Liss v. Wilcoxon, 2 Colo. 85.	34
Locke v. Lewis, 124 Mass. 1..	183

Loomis v. Jackson, 6 W. Va. 613.....	47
Lord v. Refining Co. 12 Colo. 890.....	463
Loveland v. Sears, 1 Colo. 194	19, 20
Loveland v. Sears, 1 Colo. 433	301
Lowe v. Thompson, 86 Ind. 503.....	69
Lowrie Habeas Corpus Case, 8 Colo. 499.....	244, 252
Lumber Co. v. Richardson, 81 Minn. 267.....	69
Lusk v. Ramsay, 3 Munf. 417	570, 571
Lynde v. Noble, 20 Johns. 79	50

M.

Malleable Iron Works v. Phoenix Insurance Co. 25 Conn. 465.....	505, 506
Manufacturers', etc. Bank v. Bank of Pennsylvania, 7 Watts & S. 335.....	299
Manville v. Parks, 7 Colo. 128	354
Marksbury v. Taylor, 10 Bush, 519.....	184
Marr v. Wetzel, 8 Colo. 2....	533
Martin v. Cole, 104 U. S. 30..	529
Mattocks v. Lyman, 16 Vt. 113.....	518
May v. Insurance Co. 25 Wis. 291.....	506
McAulay v. Railway Co. 83 Vt. 311.....	334
McConnell v. State, 46 Ind. 298.....	259
McCracken v. Congregation, 111 Pa. St. 106.....	71
McDaniels v. President, 29 Vt. 280...	465
McDonald v. Beach, 2 Blackf. 55	183
McKee v. Mining Co. 8 Colo. 392.....	196
McKown v. Whitmore, 81 Me. 488.....	498
McLeod v. Evans, 66 Wis. 401	270
McManus v. Mining Co. 4 Nev. 15	492
McNulty v. Prentice, 25 Barb. 204.....	119
McReady v. Rogers, 1 Neb. 124.....	561
Meagher v. Morgan, 3 Kan. 372.....	402
Mellor v. Valentine, 3 Colo. 255.....	83

Miles v. Goodwin, 35 Ill. 53..	413
Miller v. Taylor, 6 Colo. 41..	141
Mills v. Charleton, 29 Wis. 400.....	406
Milne v. Henry, 40 Pa. St. 352	184
Miner v. Marriott, 10 Copp's Land Own. 339.....	456
Mining Co. v. Finch, 6 Colo. 214.....	27
Mining Co. v. Howcutt, 6 Colo. 574.....	401
Mining Co. v. Herkimer, 46 Ind. 142.....	157
Mining Co. v. Johnson, 13 Colo. 258.....	29
Mining Co. v. Kirtley, 13 Colo. 410.....	454, 457
Molandin v. Railroad Co. 3 Colo. 173.....	428
Monell v. Dennison, 17 How. Pr. 422.....	314
Monti v. Bishop, 3 Colo. 605.	542
Moore v. Gravelot, 3 Ill. App. 443.....	60
Morgan v. Dod, 3 Colo. 551..	135
Morgan v. Olvey, 53 Ind. 6..	184
Morris v. Cheney, 51 Ill. 451	61
Mulhall v. Keenan, 18 Wall. 842.....	89
Mumford v. Brown, 6 Cow. 475.....	84
Murley v. Ennis, 2 Colo. 300	356
Murphy's Case, 51 Wis. 519..	33
Murray v. Lardner, 2 Wall. 110.....	206
Myers v. People, 67 Ill. 503.241,	248

N.

Naglee v. Wharf Co. 20 Cal. 530.....	33
Nat. Bank v. Insurance Co. 104 U. S. 54.....	269
Nester v. Busch, 64 Mich. 657	409
North v. Belden, 13 Conn. 376	299
Northrop v. Turnpike Co. 3 Conn. 544.....	33
Norwood v. Kenfield, 30 Cal. 393.....	47
N. W. Manufacturing Co. v. Circuit Judge, 58 Mich. 381	409
Nudd v. Hamblin, 8 Allen, 130	498

O.

Oil Co. v. Marbury, 91 U. S. 592.....	97
Orton v. Tilden, 110 Ind. 131	440
Osborn v. Cloud, 23 Ia. 104..	167
Owens v. Banstead, 22 Ill. 161	103

P.

Palmer v. Merrill, 6 Cush. 282	61
Paper Co. v. Clark, 8 Colo. 321.....	301
Parker v. Colcord, 2 N. H. 36	173
Paton v. People, 1 Colo. 77..	243
Peabody v. Thatcher, 3 Colo. 275.....	296
Peak v. Ellicott, 30 Kan. 156	270
Pecker v. Sawyer, 24 Vt. 459	3
Peebles v. Reading, 8 Serg. & R. 493.....	95
Pennell v. Deffell, 4 De Gex, M. & G. 372.....	266, 270
Pennybacker v. Leary, 65 Ia. 220.....	366
People v. Allen, 42 N. Y. 404	409
People v. Boylan, 25 Fed. Rep. 591.....	215
People v. Cicott, 16 Mich. 282	288
People v. City Bank of Rochester, 98 N. Y. 32.....	271
People v. Commissioners, 53 Barb. 70.....	409
People v. County Judge, 40 Cal. 419.....	50
People v. District Court, 6 Colo. 534.....	50
People v. Fleming, 7 Colo. 230.....	405
People v. Goddard, 8 Colo. 433.....	405
People v. Hayne (Cal.), 23 Pac. Rep. 1.....	581
People v. Hall, 8 Colo. 485...	406
People v. Londoner, 13 Colo. 303.....	72, 250
People v. McCumber, 18 N. Y. 315.....	69
People v. Rumsey, 64 Ill. 44.	241
People v. Selfridge, 52 Cal. 331.....	157
People v. Wilkinson, 13 Ill. 660.....	21
Perit v. Pittfield, 5 Rawle, 166.....	136
Pettingill v. Porter, 8 Allen, 6	432
Pickert v. Railway Co. 25 N. J. Eq. 316.....	334
Pierce v. Whiting, 63 Cal. 538	571
Pollard v. Clayton, 1 Kay & J. 480.....	96
Powers v. Mitchell, 77 Me. 361.....	490

Q.

Quimbo Oppo v. People, 20 N. Y. 531.....	49
--	----

LIST OF CASES CITED.

xv

R.	S.
Railroad Co. v. Abilene (Kan.), 21 Pac. Rep. 1112.....	Schillo v. McEwen, 90 Ill. 77 515
Railroad Co. v. George, 19 Ill. 510.....	Schmidlapp v. Currie, 55 Miss. 597..... 181
Railroad Co. v. Lippincott, 116 Pa. St. 472.....	Schwarz v. County Court, 13 Colo. 291..... 45
Railroad Co. v. People, 5 Colo. 40.....	Schwenke v. Railroad Co. 12 Colo. 341..... 462
Railroad Co. v. Soltwedde, 36 Amer. & Eng. R. R. Cases, 577.....	Screw Co. v. Bliven, 3 Blatchf. 240..... 167
Railroad Co. v. Steiner, 44 Ga. 546.....	Settembre v. Putnam, 80 Cal. 490..... 867
Railroad Co. v. Whipple, 22 Ill. 105.....	Shaw v. Wilshire, 65 Me. 485 135
Railway Co. v. Allen, 113 Ind. 581.....	Shephard v. Rhodes, 60 Ill. 301..... 315
Railway Co. v. Harper, 26 Ill. App. 621.....	Sieber v. Frink, 7 Colo. 148.. 141
Railway Co. v. Twombly, 2 Colo. 559.....	Siebold v. People, 86 Ill. 33 242, 218
Railway Co. v. Ward, 4 Colo. 30..... 196, 325	Silvey v. Neary, 59 Cal. 97... 532
Ray v. Raymond, 8 Colo. 467.....	Skillman v. Lachman, 23 Cal. 199..... 854
Rector v. State, 6 Ark. 187 .. 251	Skyrme v. Occidental M. & M. Co. 8 Nev. 219..... 23
Reece v. Allen, 48 Am. Dec. 336.....	Slaughter v. People, 2 Doug. (Mich.) 334..... 251
Reed v. Eames, 19 Ill. 594 ... 222	Sloan v. State, 8 Blackf. 361. 251
Reed v. Railroad Co. 50 Ind. 342.....	Smith v. Auditor-General, 20 Mich. 393..... 409
Reese v. Mitchell, 41 Ill. 365.....	Smith v. Burnham, 3 Sumn. 435..... 360
Reeve v. Smith, 113 Ill. 47... 61	Smith v. Christian, 47 Cal. 18 60
Reich v. State, 53 Ga. 73 251	Smith v. Clay, 2 Amb. 645... 95
Richards v. Grinnell, 63 Iowa, 44.....	Smith v. District Court, 4 Colo. 235..... 413
Richardson v. Kier, 37 Cal. 263.....	Smith v. Hoyt, 14 Wis. 253.. 235
Ridgeway v. Bank, 11 Humph. 523..... 103, 533	Smyth v. Carlisle, 16 N. H. 464..... 299
Roberts v. Dunn, 71 Ill. 46... 567	Snyder v. Wolford, 33 Minn. 175..... 367
Robertson v. O'Reilly, 14 Colo. 441.....	So. Boulder D. & R. Co. v. Community D. & R. Co. 8 Colo. 429..... 532
Robertson v. Wilcox, 38 Conn. 426.....	Spellman v. Curtinius, 12 Ill. 415..... 169
Rogers v. People, 9 Colo. 450 234, 235, 240, 247, 248, 249	Sperry v. Insurance Co. 26 Fed. Rep. 234..... 392
Rohrbach v. Insurance Co. 62 N. Y. 63..... 508	St. John v. Holmes, 32 Am. Dec. 603..... 535
Ross v. Duggan, 5 Colo. 85... 299, 300, 423	St. Louis v. Goebel, 32 Mo. 295 415
Rowley v. Insurance Co. 36 N. Y. 550..... 507	State v. Anderson, 40 N. J. Law, 224..... 251
Ryan v. Boyd, 33 Ark. 778... 534	State v. Barrett, 27 Kan. 213. 409
Ryerson v. Eldred, 18 Mich. 12..... 173	State v. Brown, 27 N. J. Law, 13, 20..... 382
	State v. Central Ass'n, 29 Ohio St. 399..... 157
	State v. Clarke, 54 Mo. 17... 236
	State v. De Bar, 58 Mo. 395. 236-37

State v. Devers, 84 Ark. 189.	251
State v. Haggard, 20 Tenn. 890.	381-82
State v. Moss, 2 Jones (N. C.), 66.	251
State v. Myers, 44 Ia. 590.	258
State v. Noble (Ind.), 21 N. E. Rep. 244.	581
State v. Tolle, 71 Mo. 645.	401
State v. Young, 47 Ind. 150.	409
Stebbins v. Anthony, 5 Colo. 848.	214, 241
Stevens v. Hinckley, 43 Me. 440.	301
Steward v. Insurance Co. 5 Hun, 261.	511
Stowe v. Flagg, 72 Ill. 397.	157
Sullivan v. Railroad Co. 94 U. S. 811.	95
Swartwout v. Railroad Co. 24 Mich. 389.	158
Sweeney v. Coe, 12 Colo. 485.	224, 599
Swenson v. Insurance Co. 4 Colo. 475.	411
Swift v. Smith, 103 U. S. 443.	206
Swires v. Brotherline, 41 Pa. St. 135.	86

T.

Tharin v. Seabrook, 6 S. C. 118.	69
Thomas v. Collins, 58 Mich. 64.	409
Thompson v. Tolmie, 2 Pet. 157.	314
Thompson v. Whitman, 18 Wall. 457.	533
Thompson v. Yeck., 21 Ill. 73.	222
Thorne v. Ornauer, 6 Colo. 89.	297
Torrence v. Strong, 4 Or. 39.	69
Tracy v. Reed, 4 Blackf. 56.	173
Traphagen v. Burt, 67 N. Y. 80.	365
Trecothic v. Austin, 4 Mason, 39.	265
Tripp v. Fisk, 4 Colo. 25.	462
Trust Co. v. Rigdon, 93 Ill. 458.	136
Tuck v. Downing, 76 Ill. 71.	498
Tucker v. Parks, 7 Colo. 62.	532
Twyne's Case, 1 Smith's Lead. Cas. (5th ed.) 47.	194
Tyler v. Safford, 24 Kan. 580.	567
Tynan, Adm'r, v. Walker, 35 Cal. 634.	470

U.

Ullman v. McCormic, 12 Colo. 553.	546
Underhill v. Jackson, 1 Barb. Ch. 73.	285
Union Colony v. Elliott, 5 Colo. 871.	398
University v. Parkinson, 14 Kan. 160.	436

V.

Vallette v. Smelting Co. 11 Colo. 204.	297
Van Alen v. Bank, 52 N. Y. 1.	269
Van Camp v. Commissioners, 2 Pac. Rep. 721.	61
Vance v. Olinger, 27 Cal. 358.	167
Vedder v. Vedder, 1 Denio, 257.	465
Viele v. Insurance Co. 26 Ia. 9.	507

W.

Walker v. Staples, 5 Allen, 84.	135
Wall v. Garrison, 11 Colo. 515.	404
Wallace v. Carpenter, 85 Ill. 590.	365
Ward v. Gore, 37 How. Pr. 119.	173
Warner v. Norton, 20 How. 448.	599
Water Co. v. Middaugh, 12 Colo. 443.	558
Watson v. Lederer, 11 Colo. 577.	473
Webber v. Emmerson, 3 Colo. 248.	326
Wedderspoon v. Rogers, 32 Cal. 569.	71
Wells v. Coe, 9 Colo. 159.	197
Weston v. Mining Co. 5 Cal. 188.	83
Wheeler v. Irrigation Co. 9 Colo. 248.	19
Whitaker v. Sumner, 20 Pick. 399.	135
Whitsett v. Kershaw, 4 Colo. 419.	305
Whitten v. State, 36 Ind. 196.	259
Wicker v. Comstock, 52 Wis. 815.	474
Wickersham v. Alton, 77 Ill. 620.	529
Wight v. Dubois, 21 Fed. Rep. 693.	455

LIST OF CASES CITED.

xvii

Wilcox v. Jackson, 7 Colo. 521.....	223, 386, 599	Wood v. Carpenter, 101 U. S. 143.....	498
Wilkins v. Stidger, 23 Cal. 232	492	Woodbury Sav. Bank v. Char- ter Oak Ins. Co. 31 Conn.	
Williams v. Attenborough, 1 Turn. & R. 70.....	854	517.....	506
Williams v. Canal Co. 13 Colo. 469.....	88	Woodruff v. Schultz, 49 Ia. 430.....	314
Williams v. Rhodes, 81 Ill. 588.....	98	Woodward v. Adams, 9 Ia. 474.....	568
Wilson v. Campbell, 5 Gilm. 383.....	348	Woodworth v. State, 26 Ohio St. 196.....	470
Wilson v. Insurance Co. 4 R. I. 141.....	506	Worland v. State, 82 Ind. 40	258
Wilson v. Kirby, 83 Ill. 566; 98 Ill. 240.....	273, 274	Wormser v. Meyer, 54 How. Pr. 189.....	365
Wilson v. Territory, 1 Wyo. 155.....	258	Wyman v. Bank, 5 Colo. 80..	206
Wilson v. Turnpike Road, 21 Barb. 68.....	554, 556		
Wolfley v. Mining Co. 3 Colo. 296.....	595		
		Y.	
		York v. Clemens, 41 Ia. 95...	366
		Young v. Cannon, 2 Utah, 560	258

CASES AT LAW AND IN CHANCERY

DETERMINED IN THE

SUPREME COURT OF THE STATE OF COLORADO.

JANUARY TERM, 1890.

HAMILL V. FIRST NAT. BANK OF LAS VEGAS.

1. **FRAUDULENT ASSIGNMENT OF PROMISSORY NOTE.**—The assignee of a promissory note who pays no consideration therefor and participates in the fraudulent intent of his assignor is not entitled to the immunity of *bona fide* assignees for value, before due, of commercial paper.
2. **SET OFF AGAINST A PARTNERSHIP DEMAND.**—As a general rule, debts due from one member of a partnership cannot be set off in a suit to collect claims or accounts belonging to the firm.
3. **SAME — EFFECT GIVEN TO AN AGREEMENT FOR SET-OFF.**—But if it can be shown that all parties concerned, including members of the partnership, expressly or impliedly agree that a debt owing by one of the partners may be set off against a debt owing to the firm, or *vice versa*, effect will be given to the agreement.

Appeal from County Court of Arapahoe County.

THIS action was brought by appellee, as assignee and owner of a certain promissory note executed by appellant in favor of Huntington & Co., bankers, for \$1,000, with interest at the rate of one and one-half per cent. per month until paid, payable "on demand, after date."

One division of the answer averred, among other things, that Huntington & Co., at the time said note was executed, occupied for its banking purposes a building belonging to appellant, though the lease to the premises was in the name of Joshua S. Reynolds, a member of the firm; that contemporaneously with the delivery of said note an agreement was entered into between Huntington & Co. and appellant, by which the rental of \$100 per month was, from month to month as it accrued, to be credited upon the note; that sufficient rent became due, and is now due and unpaid, to entirely satisfy said note, with interest; that after the execution of the note, and the entering into of the agreement aforesaid, Reynolds, having removed from the state "for the purpose of avoiding the crediting of said rental against said note, made a nominal transfer of the same, without consideration, to the plaintiff."

Upon motion, this portion of the answer was stricken out, and such action of the court constitutes the principal error relied upon.

Mr. R. S. MORRISON, for appellant.

Mr. J. W. HORNER, for appellee.

CHIEF JUSTICE HELM delivered the opinion of the court.

The First National Bank, plaintiff below, was in no better position than its assignor, Huntington & Co., so far as defenses to the note were concerned; for if we assume that the note was transferred before maturity,—a proposition earnestly controverted by counsel for appellant,—yet the assignment was merely "nominal," "without consideration," and for the "purpose of avoiding the crediting of said rental against the note." No authorities need be cited to show that one asserting ownership under such circumstances is not entitled to the immunity of *bona fide* assignees who take commercial

paper before due and for valuable consideration. The *bona fides* and the consideration are both wanting.

The present discussion may therefore be confined to the following question: Could Hamill have defended against a suit upon the note by Huntington & Co., the original payee, by showing the agreement in relation to rent, and establishing the fact that the amount of rent due and unpaid exceeded the principal and interest of the note?

The lease was in the name of Reynolds alone, while the note was payable to Huntington & Co.; but Reynolds was a member of this partnership, and the leased premises were used by the firm. They were necessary in carrying on its business. The firm, therefore, received the benefit of the lease the same as if it had been executed in the firm name. Under these circumstances, the agreement to credit rent upon the note was an ordinary and natural business transaction, of special advantage to the company. It can hardly be said that this agreement was not mutual, or that it was without consideration. It is quite possible that the company would not have loaned Hamill the money but for the security thus furnished.

Treating the fact that the firm enjoyed the benefit of the lease contract as unimportant, their liability in the present action sufficiently appears. As a general rule, debts due from one member of a partnership cannot be set off against debts or accounts belonging to the firm. But the application of this rule may be avoided by the conduct of the firm itself. "If it can be shown that all parties concerned have expressly or impliedly agreed that a debt owing by one of them only shall be set off against a debt owing to them all, or *vice versa*, effect will be given to that agreement." Lindl. Partn. *294, *661, and cases cited; *Pecker v. Sawyer*, 24 Vt. 459; *Hood v. Riley*, 15 N. J. Law, 127; *Clark v. Taylor*, 68 Ala. 453. See, also, *Eaves v. Henderson*, 17 Wend. 190, as to a subsequent account like the one for rent in this case.

We have not overlooked the rule of evidence relating to the extension of written contracts by contemporaneous oral agreements. It does not appear that the agreement in question was oral, and we are not at present called upon to affirm or deny the application of this rule. However, without intimating a conclusion upon the subject, we suggest that there are decisions in cases analogous in this respect to the one at bar, which seem to hold that the evidential rule in question is not controlling.

The portion of the answer under consideration stated a defense. If its averments were defective, the objection should have been taken by demurrer, and not by motion to strike. The judgment of the court below is reversed.

Reversed.

BEATON V. WADE.

- 14
25 237
1. PARTNERSHIP—SURVIVORS.—An action for a firm debt cannot be maintained against the estate of a deceased partner, in the absence of proof of a final settlement between the surviving partner and the estate, and that the partnership assets are insufficient to pay the debt.
 2. SALE OF MORTGAGED GOODS TO PAY DEBT—TO SUSTAIN AN ACTION FOR CONVERSION A SURPLUS OR BAD FAITH MUST BE SHOWN. An action brought to recover for an alleged surplus of a stock of goods delivered defendant on a bill of sale, to be resold by him and the proceeds applied in liquidation of the plaintiff's indebtedness, wherein the evidence fails to show the value of the stock so delivered, that a surplus of money or goods remained after payment of the debt, or that the defendant was guilty of bad faith in the disposal of the stock, cannot be maintained.

Appeal from District Court of Chaffee County.

FISH & BEATON were partners in mercantile business. Wade, who was carrying on a similar business, became financially involved, and thus embarrassed. He owed Fish & Beaton an aggregate indebtedness of \$1,243, and,

desiring to insure their protection, made to them a bill of sale, with a nominal consideration of \$2,500, absolute and unconditional in form, of his entire stock of goods. The stock of goods was duly delivered to Fish & Beaton, who proceeded to dispose of the same in the ordinary course of trade.

At the time of the foregoing transaction, and in connection therewith, an agreement or understanding was had between the parties concerning the holding of the goods, disposal of the same, and distribution of the proceeds therefrom. The facts, however, as to this understanding sufficiently appear in the opinion of the court. Fish & Beaton failed to account to Wade for any surplus after liquidating the debt mentioned and expenses incurred, or to return any portion of the goods to him. He brought the present action to recover from the estate of Beaton, one of the partners who had died since the transactions mentioned, the amount which he claimed as due him from the firm. His complaint contained five causes of action, the first two of which related exclusively to the matters above detailed. The remaining three counted upon claims of a wholly different character. It is unnecessary to describe them. Upon trial, judgment was rendered in plaintiff's favor; from which judgment the present appeal was taken.

Mr. G. K. HARTENSTEIN, for appellant.

Mr. T. M. S. RHETT, for appellee.

CHIEF JUSTICE HELM delivered the opinion of the court.

The complaint avers that a full and final settlement of all the partnership affairs had taken place between the surviving partner and defendant, as administrator of the estate of the deceased partner. This averment is denied and squarely put in issue by the answer, but no proof whatever was offered upon the subject. Plaintiff, there-

fore, is certainly in no better position than if his pleading had left the matter unmentioned. And the record nowhere advises us that the firm assets in the hands of the surviving partner were not sufficient to satisfy plaintiff's demand. But, so long as the partnership assets are ample, a debt of the firm *ex contractu* cannot be made out of the separate estate of a deceased partner. *Charles v. Eshleman*, 5 Colo. 107. See note 9, *597, Lindl. Partn.

Plaintiff, however, asserts that the present action is maintainable under the rule that, where a tort in the line of partnership business may be legally imputed to the partnership, especially if the firm receives benefit therefrom, the partners are each individually liable therefor. Lindl. Partn. *198, *283, and notes; Story, Partn. §§ 166, 167; *Durant v. Rogers*, 87 Ill. 508. Counsel advances the theory that there was a wrongful conversion by Fish & Beaton of goods, or proceeds therefrom, belonging to plaintiff. It is sufficient answer upon this branch of the case to say, as will more fully hereafter appear, that there is no evidence tending to establish such conversion.

It is difficult to determine from the record before us the exact conditions of the transfer to Fish & Beaton of the goods in question. But, discarding for the present defendant's claim of an absolute sale, and construing the pleadings, the evidence, and special findings of the jury, most favorably to plaintiff, we cannot sustain the judgment.

No verbal proof was offered showing, or tending to show, the real value of the stock of merchandise. The consideration mentioned in the bill of sale was \$2,500 — a sum that must have been above rather than below such value. Fish & Beaton were authorized to take possession, and proceed to dispose of the goods in the ordinary course of trade. They were either to sell all, and from the proceeds discharge the firm indebtedness of plaintiff, with interest, and reimburse themselves for reasonable

expenses incurred, paying the balance, if any, received from the sale over to plaintiff, or they were to sell enough only of the goods to pay these debts and expenses, and return the surplus thereof, if any, to plaintiff.

It is a matter of no consequence which of the foregoing arrangements was really adopted. Assuming, for present purposes, that the action would lie against defendant alone, still, before plaintiff could recover upon the theory of a firm liability, either *ex contractu* or *ex delicto*, it was incumbent upon him to show that the firm had a surplus, either in money or goods, as the case might be, belonging to him, or that it was guilty of bad faith, whereby he suffered injury. He made no effort to prove either of these things. He did not establish, or try to establish, the fact, even, that the proceeds realized from the sale were sufficient to discharge the mortgage debt and expenses; nor did he offer to prove any payment, or tender of payment, by himself, otherwise, of this debt. His original aggregate liability to the firm was fixed at \$1,243; and, considering the character of the goods, the expenses incident to handling them, and the uncertainties of the retail market, it might not have been inconsistent with good faith if there were no such surplus to be accounted for.

We do not notice the three remaining causes of action stated in the complaint. They were put in issue, but upon the trial no evidence was offered by plaintiff in support thereof. The judgment is reversed.

Reversed.

O'REILLY, EX'R, ETC. V. BURNS ET AL.

1. CONSTRUCTION OF CONTRACTS—MERGER OF UNADJUSTED EQUITIES AND EXTINGUISHMENT OF RIGHTS OF ACTION BY TRANSFER AND SALE.—Where claims, counter-claims and unadjusted equities exist or are asserted by two parties, one against the other, growing out of certain transactions had between them in relation to the

purchase of a fractional portion of a mine, and their respective rights of ownership thereto, together with the claims asserted for profits alleged to have been derived by sales of ores extracted therefrom, with a lien claim by one in the interest of the other for purchase money advanced, answered, by the allegation of payment in full, by the other; and pending this unsettled state of their affairs both parties, on the same day, by separate instruments, convey and assign to a third party all their rights, titles and unadjusted interests and equities in and to the mine, profits past and prospective, including the loan and entire subject-matter, the titles and all claims and equities of the parties are thereby merged in the purchaser, and neither of the original parties has any right of action against the other in respect thereto.

2. **IMPEACHMENT OF CONTRACT ON GROUND OF SUPPOSED INEQUITABLE AND UNCONSCIONABLE PROVISIONS — FACTS AND CIRCUMSTANCES PROPER FOR CONSIDERATION.**—In case of a mutual contract made between two parties, whereby one agrees to loan the other a certain sum of money to be invested by him in the purchase of an interest in a certain mine, and the other party stipulates to give, as security and consideration for the accommodation, *first*, the assignment of a claim alleged to be due him, then in litigation; *second*, a mortgage upon the mining interest to be purchased, and *third*, an equal interest with the purchaser for all time to come in the profits that may be derived from the working of the purchased interest, the latter stipulation cannot be adjudged void as inequitable and unconscionable, in view of the uncertain character of the securities given and the risks assumed by the lender.

Appeal from District Court of Arapahoe County.

THIS was a proceeding in equity for an accounting by Charles Burns and Nathan Hurd (the latter an assignee of an interest in the subject-matter) against Peter Finnerty. Defendant died pending the proceedings, and his executor, Thomas O'Reilly, was substituted as defendant.

On March 5, 1884, Burns applied to Finnerty for a loan of \$1,100, and, as circumstances clearly indicate, for the speculative purchase of an interest in an undeveloped mine in Aspen. Finnerty advanced the money, receiving Burns' promissory note, payable three months after date without interest, and took for his further security a

written agreement, which is in words and figures as follows:

"This article of agreement, made and entered into this 5th day of March, 1884, by and between Charles Burns, party of the first part, and Peter Finnerty, party of the second part, made in duplicate, witnesseth, that whereas, the party of the first part has this day borrowed from the party of the second part the sum of eleven hundred dollars (\$1,100), and has executed to the party of the second part his note therefor, in and by which said note the party of the first part has agreed to pay the party of the second part the said sum of money on or before three months from and after the day and date thereof; and whereas, the party of the first part is desirous of securing and indemnifying the party of the second part for and on account of said loan and accommodation:

"Now, therefore, the party of the first part, being the owner of a certain claim against the German National Bank of Denver, for the sum of three thousand two hundred and twenty-five dollars (\$3,225), which said claim is represented by a suit now pending and undetermined in one of the courts of the county of Arapahoe and state of Colorado, the party of the first part agrees to assign, and does assign, to the party of the second part, the said claim and action against said bank, to be by him held as security for the payment of the said note; and, in the event that the party of the first part shall fail to make payment thereof, then the party of the second part is, by this agreement, authorized to prosecute said cause to reimburse himself out of the said judgment to be obtained, for the said sum of money as aforesaid advanced to the party of the first part, paying over to the party of the first part the remainder or surplus thereof, whatever the same may be.

"And whereas, the party of the first part intends to purchase certain mining interests in the county of Pitkin, in the state of Colorado, to wit, an interest in the

Durant mine, in Roaring Fork mining district, county of Pitkin and state of Colorado: Now, therefore, the party of the first part does further agree that, so soon as he shall obtain said interest in said mine, he will, for the purpose of securing said claim for said money so advanced, convey and transfer said interest in said Durant mine to him, the party of the second part, to be by him held as security for the loan of said sum of eleven hundred dollars (\$1,100) herein specified; and the party of the second part, for and in consideration of the premises herein conveyed, does hereby covenant, stipulate, and agree, to and with said party of the first part, that if the said party of the first part shall pay to him the said sum of money according to the tenor and condition of said note, then the party of the second part shall reassign said claim against said bank, and said action thereon, and at once convey to said party of the first part the said interest in said Durant mine, fully and freely, without any terms or conditions whatsoever; and the party of the second part hereby expressly acknowledges that he takes the said transfer of said properties and choses in action solely and simply as security for the said loan so by him made, and recognizes and acknowledges the title, ownership and interest therein in the party of the first part, subject only to his claim as security thereon for the purposes aforesaid. The party of the second part agrees that he will make no transfer, sale or assignment, either of said claim or of said interest in said mine, to any person or persons whomsoever, without the request or consent of the said party of the first part, until after the breach of the condition of said note; and, in the event the said party of the first part should fail to pay said note according to the terms and conditions thereof, then the party of the second part will confer with the party of the first part as to the best means and method of obtaining his said money, in the event further arrangements cannot between them concerning the same be made.

And the party of the second part does further agree that if during the continuation of said loan the party of the first part should desire to sell said interest in said mine, or to assign said claim against said bank, then the said party of the second part will consent to such sale and disposition; reserving, however, to himself the right to claim the payment of the said loan, so made by him as aforesaid, out of the proceeds of such sale or assignment. In witness whereof the parties have hereunto set their hands and seals the day and year first above written.

"CHARLES BURNS. [SEAL.]

"PETER FINNERTY. [SEAL.]

"Attest: D. C. LYLES.

"For the consideration hereinabove expressed, it is mutually stipulated and agreed that in any event, and notwithstanding the payment of the note by said Burns, as in the above contract expressed, the said Peter Finnerty shall be entitled to receive, and shall own as his own property, one-half of any and all profits that may hereafter be realized by said Burns or his assigns from working the one-tenth interest in said Durant mine, for all time to come; but that said Finnerty is not to be at any expense, or contribute any consideration, money or other thing, for developing said mine, or said interest therein.

CHARLES BURNS. [SEAL.]

"Attest: D. C. LYLES."

After making these articles of agreement, Burns acquired an interest in the Durant mine as therein proposed, and on or about the 11th of March, 1884, conveyed the same to Finnerty as thereby stipulated. The interest thus conveyed was the same as described in the deeds of both Burns and Finnerty to Hyman, hereinafter referred to.

On the 3d of April, 1884, Burns, out of money which he realized as royalties from the sale of ores taken from the mine, paid Finnerty \$1,000 upon the note. In the complaint it is alleged that on or about the 15th of

March, 1885, Burns tendered Finnerty the balance of the principal and interest due upon the note. This is denied in the answer. It is also alleged in the complaint that the institution of a certain suit by Finnerty, respecting the property, became necessary, and that in such litigation he was put to certain costs and expenses amounting to about \$700. In the answer a much larger expenditure by Finnerty is alleged.

By the replication it is admitted that Burns had realized and received the sum of \$1,200 as profits arising from the sale of ores from the mine after the making of the contract of March 5, 1884, and after the execution of said deed from Burns to Finnerty. This is the situation of the parties, and the relations existing between them growing out of the loan.

On August 13, 1886, Finnerty, at the city of Denver, by quitclaim deed executed and delivered, conveyed to David M. Hyman all his right, title and interest in and to an undivided portion of the said mine. On the same day, in the city of New York, by deed executed and delivered, Burns, claiming the entire and unincumbered ownership, conveyed to said David M. Hyman his interest in said mine, as well as his rights and interest in and to ores mined therefrom, and all the proceeds thereof, and all his estate, right, title, interest, possession, claim and demand whatsoever, as well in law as in equity. The descriptions of the interest conveyed are identical, to wit, an undivided 20,094-255,1000 interest.

On the day of the execution of the Burns deed in New York a certain contract was made and entered into by and between Burns and David M. Hyman, in which, referring to the undivided interest conveyed by deed, the following language is used: "The said Charles Burns further represents and agrees that he has made no conveyance of said interest except as herein stated, and that said interest in law and equity belongs to him. He did convey said interest, by way of mortgage, to one Peter

Finnerty, to secure a claim of \$1,100. That he has repaid to said Finnerty the sum of \$1,000, and tendered him the balance, and that any other claim the said Finnerty may set up to said interest is without consideration, fraudulent and void." The price paid to Burns was \$6,000, and that paid to Finnerty was \$8,000. Hurd is a party plaintiff by virtue of an assignment of a portion of the interest of the subject-matter of the suit.

The object of the suit, as gathered from the complaint and prayer, is to compel an accounting and payment to the plaintiffs of the money received by Finnerty from Hyman, after deducting such expenses as he had incurred; the contention being that Finnerty was but a mortgagee of the entire undivided part of the mine conveyed to him, and, as such, should account for the whole of the proceeds of the sale made by him, after deducting therefrom the \$1,100 and accrued interest, less the \$1,000 which had been paid, and also deducting such necessary expenses as he had incurred in and about the trust.

The contention of the defendant is that Finnerty was the mortgagee of only half of the undivided part of the mine conveyed to him by Burns, and that as to the other half, the beneficial interest therein being wholly vested in him, he was to be regarded, in law and in fact, as the substantial owner thereof. By the answer affirmative relief was sought, but was subsequently abandoned.

The court below found that Finnerty received a deed conveying to him the legal title of the whole of said fractional part of said mine, but it nevertheless, in equity, vested in him, as owner of an interest equal to an undivided one-half interest of said fractional part of said mine, and an interest as mortgagee in the remaining undivided one-half of said fractional part, to secure him the repayment from Burns of the amount loaned. The equity of redemption of said remaining undivided half of said fractional part belonged to plaintiff Burns.

The court also found that Finnerty was entitled to

\$600 of the \$1,200 received by Burns as royalties from working the fractional part of said mine; to \$1,200, money necessarily expended by him; and to \$100 unpaid upon the note, with interest upon said respective sums, which aggregated \$2,183; also that Finnerty, on the 13th of August, and while plaintiff Burns' interest continued in and to said fraction of said mine, conveyed the whole thereof, including the interest of said Burns, to Hyman; that he received \$8,000 therefor, and that, of the \$8,000 received, Finnerty was entitled to only one-half, and that after deducting from the \$4,000, going to Burns, the amount found to be due to him from said Burns, \$2,183, that judgment should be entered for the sum of \$1,816; and judgment was rendered in favor of said plaintiffs, and against defendant, in accordance with said finding, to which defendant excepted and assigned as error: (1) The court erred in its findings and decision in favor of the plaintiffs and against the defendant. (2) The court erred in not finding and rendering judgment for the defendant and against the plaintiffs.

The following cross-errors are assigned by appellees: (1) The court erred in finding that under the contract entered into between Burns and Finnerty on the 5th of March, 1884, Finnerty acquired a half interest in and to whatever interest Burns purchased in the Durant mine, which was 20,094-225,1000. (2) The court erred in giving the defendant the benefit of the one-half of the \$1,200 received as royalty.

Mr. L. S. DIXON, for appellant.

Messrs. L. C. ROCKWELL, W. T. HUGHES and BERTRAM ELLIS, for appellees.

RICHMOND, C. There is no controversy concerning the loan of the money; the execution of the agreement as above set forth; the execution and delivery of the deed from Burns to Finnerty; the receipt of the royalty of

\$1,200; the payment of money in and about the suit by Finnerty; and the execution and delivery of the deeds on the 13th of August, 1886, by both Burns and Finnerty, to David M. Hyman. The only controversy in this case is as to the effect of the *addendum* to the agreement of March 5, 1884, whereby an interest in the profits of the mine was conveyed by Burns to Finnerty.

It is fair to assume that this agreement, including the *addendum*, was made, executed and delivered at the same time. It appears to be attested by the same witness, and it is not disputed by any evidence or in the pleadings. "In the construction of this contract it is proper for the court to place itself in the position of the contracting parties at the time of its execution, and look at the occasion which gave rise to it; the relative position of the parties; their designs as to the objects to be accomplished."

Viewed from this stand-point, the nature of the transaction appears to have been as follows: Burns desired a loan. Finnerty was able and willing to loan. Burns was anxious to secure the repayment of the principal loaned, and, to do so, agreed to make the conveyance of the interest in the mine, and also to assign an interest in a claim against the German National Bank. Both of these securities, it must be admitted, were questionable. From neither was it certain Finnerty would realize the money advanced. Both depended upon contingencies; and, as an additional inducement and consideration for the accommodation, Burns proposed to Finnerty to share equally with him the profits of the interest he should obtain in the Durant mine. Finnerty was, to the best of Burns' ability, secured as to the repayment of the principal, and for the hazard of the loan was to be compensated by prospective profits in the mine. Payment of interest on the loan was not contemplated.

It is contended that this construction of the transaction cannot be sustained, as it is inequitable and unconscion-

able. The intention of the parties and the legal effect of the writings cannot thus be summarily disposed of. When the nature of the transaction is considered, and the uncertainty attending it, and the chance of losing the entire investment, the contract as above construed does not appear to have been unreasonable or inequitable. Were mining transactions, in regard to the acquiring of interests in undeveloped property, to be judged by results afterwards, instead of conditions as they existed at the time of the investment, many titles of far greater value than the one in question would be annulled for inadequacy of consideration, where the amount invested was much less in the first instance than in this case.

Finnerty, by the conveyance, took the legal title, subject to defeasance in the payment of the money loaned to Burns. Upon such payment the legal title of the entire interest was to re-invest in Burns, while Finnerty was for all time to receive the profits of one-half the interest, if there should be any, and the control and management was to remain in Burns. But such profits were to be net results, while Finnerty was not to be chargeable with any costs of development. After the payment of the \$1,000, Finnerty's interest was a demand for the further sum of \$100 due, and an ownership of one-half of the profits resulting from the mining for all or an indefinite time, until the ore should be exhausted. In this view of the case, we do not consider the question which conveyance (Burns to Hyman, or Finnerty to Hyman) was prior in point of time, or whether they were contemporaneous, important. Each dealt for himself, and each had an assignable interest. By the deed of Burns he conveyed to Hyman his interest in the mines, to the ores mined therefrom, to the proceeds of the same, "and all his estate, right, title, interest, possession, claim and demand whatsoever, as well in law as in equity." By the contract, executed by Burns to Hyman on the same date as the deed, he agrees or covenants that "he did

convey said interest by way of mortgage to one Peter Finnerty to secure a claim of \$1,100; that he had repaid to said Finnerty the sum of \$1,000, and tendered him the balance; and that any other claim the said Finnerty may set up to said interest is without consideration, fraudulent and void." By the conveyance his entire interest in the property, legal and equitable, is transferred to Hyman. Hyman was substituted in his stead, and had succeeded to all existing equities in connection with Finnerty; and, for further certainty or assurance in the contract, he set out and defined what the existing equities were between himself and Finnerty. The deed and contract were ample to and did divest him of all interest, and invest Hyman, not only with the legal and equitable interest of Burns, but by the substitution a right to adjust the equities theretofore existing between Burns and Finnerty.

On the same date, Hyman, through his agent in Denver, purchased and received a conveyance from Finnerty of the entire interest, including unadjusted rights and equities existing between him and Burns. The transactions were separate and distinct; each dealing with his own interest regardless of the interest of the others.

By the two conveyances to Hyman, the titles were merged, and the equities merged and extinguished. Burns, having released to Hyman all his interest, had no further claim against or matters to adjust with Finnerty. If Hyman saw fit, notwithstanding Burns' agreement, to recognize a greater interest in Finnerty than that asserted by Burns, and purchase and pay for it, it was entirely a matter of his own, in which Burns could have no interest, unless called upon by Hyman to make good his assertion of want of interest in Finnerty, as stated in the contract. Finnerty, at the time of the sale, and in making the conveyance, undoubtedly took into consideration the balance due him from Burns, the amount of royalty due for ore extracted, and the amount

he was out for money advanced in litigation; and, in making his price in a lump sum, received what he considered compensation for his existing claims and interest in the property, and it was paid. Burns, by his conveyance and agreement, was estopped to deny that all existing rights and claims had not passed to Hyman. It follows that Burns had no right to participate in any way in the transaction between Finnerty and Hyman, or the proceeds of it, and had no cause of action against Finnerty. The transfer must be regarded as an assignment of all rights of action. We are therefore of the opinion that, at the time of the institution of this proceeding, Burns had no right of action against the defendant Finnerty, and, in view of the fact that affirmative relief asked by the answer has been abandoned, the judgment should be reversed, and cause remanded, with instructions to the court below to dismiss the action.

REED and PATTISON, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is reversed, and the cause remanded, with directions to dismiss the action.

Reversed.

MR. JUSTICE ELLIOTT, having presided at the trial below, did not participate in this decision.

IN RE ROGERS.

1. EXERCISE OF ORIGINAL JURISDICTION BY SUPREME COURT.—It is the settled practice of this court not to exercise its original jurisdiction except in cases *publici juris*, or in cases where it is shown that a refusal to take jurisdiction would practically amount to a denial of justice.
2. CERTIORARI FROM DISTRICT TO COUNTY COURTS.—Compared with the district courts, the county courts are, in point of jurisdiction, inferior to, and their judgments and proceedings are subject to review by writs of *certiorari* from, the district courts, as provided by chapter 28 of the code.

14	18
17	96
14	18
26	228
14	18
15a	344
14	18
16a	439
14	18
19a	396

Application for a Writ of Certiorari.

Messrs. ROGERS, SHAFFROTH & WHITFORD, for petitioners.

Messrs. BUCKLIN, STALEY & SAFELY, for respondent.

MR. JUSTICE ELLIOTT delivered the opinion of the court.

THIS is an original application in this court for a writ of *certiorari* to the county court of Mesa county. It is set forth in the affidavit upon which the application is based that the county court has exceeded its jurisdiction in the matter of certain condemnation proceedings therein pending under the act of eminent domain, etc.

Upon presentation of the affidavit a rule was granted to show cause why the writ should not issue, with the express understanding that, if it should be found that the district courts have jurisdiction in such cases, the rule would be discharged. It is the settled practice of this court not to exercise its original jurisdiction except in cases *publici juris*, or in cases where it is shown that a refusal to take jurisdiction "would practically amount to a denial of justice." *Wheeler v. Irrigation Co.* 9 Colo. 248.

The writ of *certiorari* provided by chapter 28 of the Code of Civil Procedure is the same in substance as the common-law writ which lies for the removal of causes from an inferior to a superior tribunal. Since no appeal lies from the county court to the district court in condemnation proceedings, it is assumed by counsel for petitioner, on the authority of *Loveland v. Sears*, 1 Colo. 194, that the district court is not superior to the county court in respect to such proceedings; and consequently that the district court is without jurisdiction in this case to review the proceedings of the county court upon *certiorari*. The decision in *Loveland v. Sears* was based upon the prior decision of *Cass v. Davis*, *id.* 48, which

was to the effect that the territorial statute providing for appeals from the probate court to the district court was repugnant to the organic act of the territory, giving those courts concurrent jurisdiction in civil cases to a certain amount. Without questioning the correctness of these decisions under the organic act, it is plain they do not apply to the organization of our judicial system under the constitution.

The jurisdiction of the county court in civil cases is not fixed by the constitution; but it is expressly declared that such jurisdiction may, within certain definite limits, be prescribed by law, and also that appeals may be taken from the county to the district court in such cases as may be provided by law. Art. 6, § 23. The writ of *certiorari* was denied in the case of *Loveland v. Sears*, not because appeals *were not* provided for from probate to district courts, but because the opinion had been expressed in *Cass v. Davis* that such appeals *could not* be thus provided for. This reason certainly does not now obtain.

The district courts of this state are invested by the constitution with "original jurisdiction of all causes, both at law and in equity, and such appellate jurisdiction as may be conferred by law." Art. 6, § 11. This language is broad enough to include writs of *certiorari*, as well as the other extraordinary and remedial writs of which the supreme court is invested with jurisdiction by section 3 of the same article. The original jurisdiction of the district courts is, by the constitution, general and unlimited, subject only to reasonable statutory regulation, and the lawful supervision of the supreme court; while, as we have seen, the jurisdiction of the county courts is limited, and, with certain exceptions, purely statutory. Hence, as compared with the district courts, county courts are in point of jurisdiction inferior, and their judgments and proceedings are subject to review by writs of *certiorari* from the district courts, as pro-

vided by chapter 28 of the code. *Connor v. Estate of Connor*, 4 Colo. 74; *Liddicoat v. Treglown*, 6 Colo. 47; *People v. Wilkinson*, 13 Ill. 660.

In view of the conclusion at which we have arrived, we express no opinion as to the merits of this application. We have no doubt of the jurisdiction of the district courts in proper cases of this kind; and hence we must decline to exercise the original jurisdiction of this court herein. In doing this it may not be improper to refer to the extent of the appellate or principal jurisdiction of this court. There are now fifty-five counties in this state, for each of which, county and district courts are established, besides criminal courts in two counties. These courts of record are presided over by sixty-nine different judges; and the judgments and proceedings of each of these tribunals are subject to review by this court upon appeal or writ of error. Under these circumstances, considering the novel and diversified character of our litigation, and the over-burdened condition of the docket of this court as an appellate tribunal, it is an imperative necessity, and it should not be a subject of surprise, that we endeavor to restrict its original jurisdiction to the smallest limits consistent with the administration of justice. The rule to show cause is discharged, and the application for writ of *certiorari* is denied.

Application denied.

CANNON AND DOUNCE V. WILLIAMS.

1. MECHANIC'S-LIEN STATUTES — CONSTRUCTION AND REQUIREMENTS.—

Mechanic's-lien statutes in this state being equitable in purpose and remedial in nature are to receive a liberal construction by the courts. But there must be a substantial compliance with all material requirements thereof.}

2. LIEN NOT DESTROYED BY HARMLESS MISTAKE OF CLAIMANT.—

Where the lien-claimant, acting in good faith, by mistake includes

14	21
14	81
14	21
18	304
18	401
14	21
3a	32
14	21
21	290
14	21
10a	204
10a	205
10a	208
14	21
19a	279
19a	281

an item for which he is not entitled to a lien, such mistake does not, of itself, destroy the lien.

3. **ABSTRACT OF INDEBTEDNESS AN ESSENTIAL REQUIREMENT.**—Where the statute requires “an abstract of indebtedness showing the whole amount of debt, the whole amount of credit, and the balance due or to become due,” the mere statement of the balance due is not a compliance therewith.
4. **ERRORS, WHEN TO BE OVERLOOKED.**—When there has been a substantial compliance with the statute, mistakes that do not tend to deceive parties interested may be overlooked.
5. **PERSONAL JUDGMENT.**—Under the act of 1888 a personal judgment may be rendered for the amount found due, though the right to a lien be not sustained.

Appeal from District Court of Douglas County.

SUIT was begun by one George C. Bates against James Cannon, Jr., William J. Dounce, Morgan D. Williams and others to establish his claim for services rendered as an attorney, and to secure a prior lien upon certain coal mines as to which two of the defendants were considered owners and the others lien-claimants. Williams filed an answer and cross-complaint, alleging the performance of labor upon the mining property, the non-payment of compensation therefor, and a compliance with the mechanic's-lien law then in force. He asked judgment for \$1,923.39, and that the same be made a lien upon the premises in accordance with the statute.

Cannon and Dounce filed an answer to the cross-complaint and the issue thus made was tried by a referee, who reported findings of fact, conclusions of law, and a judgment denying the lien. Exceptions being taken to the conclusions of law and judgment, the court upon the hearing set them aside and entered judgment against Cannon for \$1,822.66; also a decree giving Williams a lien for \$1,075 of the amount claimed, as demanded in his cross-complaint. From that decree the present appeal is prosecuted.

Mr. T. D. W. YONLEY, for appellants.

Mr. WILLIAM DILLON, for appellee.

CHIEF JUSTICE HELM delivered the opinion of the court.

No exceptions were taken to the referee's findings of fact; hence these findings are to be accepted as true. The decision of this court turns, therefore, upon the law applicable to such facts.

Differences of opinion exist among the decisions as to whether mechanic's-lien statutes should receive a strict or a liberal construction. But since these statutes are manifestly equitable in purpose and remedial in nature, and especially since the course of legislation on the subject in this state has been reasonably just to all parties concerned, we are inclined to favor the doctrine of liberal construction. *Barnard, Adm'r, v. McKenzie*, 4 Colo. 251; *De Witt et al., Appellants, v. Smith et al., Respondents*, 63 Mo. 263; *Skyrme v. Occidental M. & M. Co.* 8 Nev. 219. But to lay the foundation for this peculiar relief there must of course be a substantial compliance with all material requirements of the law. Phillips on Mech. Liens, sec. 16 and cases; *G. S. L. & P. R. R. Co. v. Harris*, 12 Colo. 226.

The statute in force at the time of these proceedings (sec. 2140, G. S.) required the lien-claimant to file a "statement" or notice with the clerk and recorder of the county where the land was situate, containing among other things "an abstract of indebtedness showing the whole amount of debt, the whole amount of credit, and the balance due, or to become due, to the claimant." In the case at bar the notice contains no such abstract; it wholly fails to state the account; it names neither the total amount of debt nor the total amount of credit; it makes no attempt in any way to show the debits or credits; it merely states the balance claimed to be due. Moreover, more than one-third of this alleged balance represents an item for which no lien could be allowed under the statute. We shall assume that appellee, by including this item, was not guilty of bad faith either in

fact or in law, and that his act constituted an innocent mistake, which would not *of itself* destroy the lien. Phillips on Mech. Liens, sec. 355. Nevertheless it might deceive, and is a serious additional imperfection in the notice.

We do not speculate concerning the purpose of the legislature in requiring that the notice contain this abstract. Whatever such purpose may have been, it is sufficient for us that the statute was thus written and that its language is free from ambiguity. The doctrine of liberal construction is not broad enough to cover such defects as the one in question. There is not a substantial compliance with the statute. Stating a balance due can hardly be regarded even as an attempt to give the abstract of indebtedness required. And this is especially true where a large part of the alleged balance arises from an account for which no lien could be decreed. Phillips on Mech. Liens, sec. 357 and cases cited.

Counsel for appellee seeks to avoid the effect of the omission in question by claiming that appellants could not have been deceived or misled thereby. When there has been a substantial compliance with the statute, mistakes that do not tend to deceive parties interested may be overlooked. But the consideration that there is in a given case an absence of resulting injury in fact cannot supersede or dispense with the material steps designated as a condition precedent to the lien; if it could, liens might be maintained in many cases without filing any "statement" whatever; for it will sometimes happen that the parties interested are in possession otherwise of all facts to be stated in the notice, including the intention to claim a lien.

But the facts in the case at bar, as well as the law, do not support counsel's premises. During the period of appellee's service under his employment, which employment was by Cannon, the property changed hands twice. The first of the three owners, the Denver Coal Company,

was not made a party to the original suit, nor to the proceeding by cross-complaint; the second owner was appellant Cannon; the third owner, who held title at the time of trial, was appellant Dounce. Cannon does not appear to have been Dounce's agent in mining and marketing coal. The referee reports that after Dounce purchased, Cannon continued to work "the mine for his own benefit, with the knowledge of Dounce, though Dounce was not interested pecuniarily in such mining operations." The due-bills resulting from the settlement between appellee and Cannon, prior to the filing of the notice in question, were in Cannon's name alone, and apparently exclusively on his own behalf. Under these circumstances, this settlement, without other proofs, cannot be regarded as putting Dounce in possession of the facts relating to the debits and credits constituting appellee's account. Thus the settlement, which is the main reliance of counsel in support of his proposition that Dounce could not have been misled or prejudiced by the defective notice, fails to perform the function assigned it.

Under the mechanic's lien law of 1872, and the lien laws enacted during the succeeding ten years, the foregoing conclusions would probably require a dismissal of the cross-complaint. For the money judgment then shared the fate of the lien. *Barnard, Adm'r, v. McKenzie, supra*; *Hart et al. v. Mullen*, 4 Colo. 512.

But the lien statute of 1883, under which the parties to this litigation acted, contained the following: "Each party who shall establish his claim under this act shall have a judgment against the party personally liable to him for the full amount of his claim so established, and shall have a lien established and determined in said decree upon the property to which his lien shall have attached to the extent hereinbefore stated" (G. S. sec. 2155); also, "The practice under this act shall be in accordance with the Code of Civil Procedure of the state of Colorado." G. S. sec. 2161.

Giving these provisions a liberal construction we must

regard them as modifying the preceding statutes; and a departure from the view announced in the decisions mentioned is accordingly rendered necessary. Such legislative action, while in accord with the principles of the reformed procedure, tends also to promote substantial justice. The pecuniary recovery is based upon a judicial investigation of all matters that would be pertinent in an ordinary action at law; a multiplicity of suits is avoided; and it will hardly be claimed that injury follows because the court, as a chancellor, determines the amount of plaintiff's recovery. Besides, the special finding of a jury may be invoked upon the question of damages, as in other equity cases.

The foregoing construction is in harmony with the policy of present legislation upon this feature of the subject in hand. The act now in force places the right to a personal judgment for the sum due, though the lien itself fail beyond possible controversy. Session Laws 1889, p. 252, sec. 11.

The decree recognizing the lien upon the premises referred to is reversed; but the judgment against Cannon for \$1,822.66 will not be disturbed. The cause is remanded with directions to dismiss the proceedings so far as the mechanic's lien is concerned, but to issue execution for collection of the debt as in the case of money judgments recovered through ordinary actions at law.

Decree reversed.

MR. JUSTICE HAYT (*dissenting*). I concur with that portion of the foregoing opinion in which it is held that the mechanic's lien cannot be maintained, but dissent from the views expressed upon the other branch of the case. In my judgment, upon the failure of the appellee to establish a lien, the entire proceedings should have been dismissed. This rule has been repeatedly announced by this court, and ought not to be now departed from unless changed by positive legislative enactment. *Jensen v. Brown*, 2 Colo. 694; *Barnard, Adm'r, v. McKenzie*, 4

Colo. 251; *Hart et al. v. Mullen*, 4 Colo. 512; *Mining Co. v. Finch*, 6 Colo. 214; *Greeley, S. L. & P. Ry Co. v. Harris*, 12 Colo. 226. Such change was made at the last session.¹ See Session Laws of 1889, sec. 11, p. 252. This cause had been tried and determined in the courts below, however, prior to this amendment, and, of course, cannot be affected thereby.

I discover nothing in the language quoted in the majority opinion from sections 2155 and 2161, General Statutes, that permits the entry of a personal judgment unless the lien be first established. I am of the opinion that the amendment of 1889 referred to was enacted for the sole purpose of making this change. If the prior statute permitted a personal judgment without a lien, this amendment of 1889 was unnecessary. I think it was necessary, and that the only authority for such judgment is derived therefrom. As this case is not affected by the act of 1889, the entry of a personal judgment against Cannon was improper, and this part of the judgment should also be reversed.

BRAHONEY ET AL. v. DENVER, U. & P. R. Co.

1. PRACTICE IN SUPREME COURT — PRESERVING OBJECTIONS TO EVIDENCE AND INSTRUCTIONS.— Objections and exceptions relating to evidence and instructions given at the trial cannot be considered on error or appeal unless properly preserved in the record filed in this court.
2. SAME — OBJECTIONS TO PLEADINGS.— Objections to a complaint on the ground of misjoinder of parties, or that several causes of action are improperly united, and other like objections, if not taken by demurrer or answer, will be deemed waived.

Appeal from Superior Court of Denver.

Messrs. BROWNE & PUTNAM, for appellants.

Messrs. WOLCOTT & VAILE, for appellee.

¹ By the insertion of the following provision: "If, on trial of a cause under the provisions of this act, the proceedings will not support a lien, the plaintiff or plaintiffs may proceed to judgment as in an action on contract, and execution may issue as in such cases provided, and said judgment shall have all the rights of a judgment in a personal action."

MR. JUSTICE ELLIOTT delivered the opinion of the court.

From the abstract of the record upon which this appeal is prosecuted, it appears that prior to the institution of this action in the court below each of the appellants, seven in number, had commenced his separate suit in the superior court of Denver against appellee, claiming damages to certain real estate, or to some interest therein, owned by them in severalty, by reason of the occupation of certain streets, alleys or lands by said appellee for its railroad. Thereupon appellee, a railroad corporation organized and doing business in this city, county and state, commenced this action in said superior court against appellants, and in its complaint, by appropriate averments, set forth, among other things, certain facts showing that it was in no wise liable to appellants for the damages claimed in their several suits, and asked that said appellants, respectively, be enjoined from prosecuting the same, and that the compensation and damages claimed in their said several suits, if it should be found they, or either of them, were entitled thereto, might be ascertained and assessed by commissioners appointed by the court, or by a jury of freeholders, as provided by the act of eminent domain.

Appellants filed their answer to the complaint, and by consent the several complaints in their original suits were made a part of said answer. In their answer they also prayed that the compensation and damages claimed by them might be assessed by a jury to be selected by the court pursuant to the statute, etc. Replication being filed, the cause was, by consent of the parties, tried to a jury of six persons, who, upon consideration of the evidence and instructions of the court, returned a verdict in favor of appellee. Motion for a new trial being overruled, judgment was entered on the verdict perpetually restraining appellants from prosecuting their several original suits. To reverse this judgment the case is brought here by appeal under the act of 1885.

The abstract of the record filed in this court contains no bill of exceptions, nor any part of the evidence or instructions to the jury. Hence we are not advised that appellants made any objections, or reserved any exceptions, upon which to base assignments of error relating to the merits of the trial. They did not by demurrer or answer make the objection that there was a misjoinder of parties defendant, or that several causes of action had been improperly united, or other objection of like character. Hence they must be held to have waived all such objections. Civil Code, § 55. The objection that the complaint does not state facts sufficient to constitute a cause of action might now be considered, if error had been properly assigned upon that ground; but from a careful examination of the pleadings we are satisfied that such an assignment would not be well taken. The facts stated were sufficient to constitute a cause of action, even though appellants might, if they had not waived the same by their mode of pleading, have successfully attacked the complaint on other grounds. *Mining Co. v. Johnson*, 13 Colo. 258.

It is assigned for error that the court exceeded its jurisdiction in entertaining the complaint of appellee against appellants, and that the whole proceeding in said superior court was irregular, and without authority of law.

It must be admitted that the suit or proceeding was somewhat anomalous, though not altogether without precedent, as a bill of peace, or proceeding to avoid expense and multiplicity of suits. *Railroad Co. v. Steiner*, 44 Ga. 546. The court was one of general jurisdiction, within the limits of the city of Denver, in all civil causes both at law and in equity. Gen. St. ch. 103, § 3. This cause was an equitable one, though it contemplated, in a certain contingency, the assessment of compensation and damages to appellants according to the act of February 12, 1877, providing for the exercise of the right of

eminent domain. The court was not without jurisdiction over the parties or the subject-matter. By joining in this proceeding without objection or exception, appellants must be held to have waived all objections to mere irregularities or errors of form. As neither the evidence nor the instructions are before us, we must presume that the verdict of the jury upon the merits was fully warranted; and, the court having by its decree approved and confirmed the same, we see no reason for disturbing it.

The judgment is accordingly affirmed.

Affirmed.

CONWAY V. JOHN ET AL.

1. CORPORATIONS — TRANSFER OF STOCK. — Under the laws of this state, title to stock in a corporation, as against creditors, can only pass by transfer on the books of the company.
2. EVIDENCE — ORAL PROOF OF CONTENTS OF MISSING FILES. — The proper foundation being laid, the character and contents of the missing files in a cause tried before a justice of the peace may be established by oral evidence.
3. ATTACHMENTS BEFORE JUSTICES OF THE PEACE — SERVICE OF NOTICES ON NON-RESIDENTS. — Under the act of 1879, in relation to attachments before justices of the peace, requiring notices in certain instances to be posted in three of the most public places within the precinct, evidence showing that one of such notices was posted on the front door of the court-house, one on the side of the stairs leading to the justice's office, and one on a certain corral fence, and that "these places were then regarded, and would now be, three about as public places as could be found in the precinct," shows a sufficient compliance with the statute, as against a collateral attack upon the proceedings.
4. ATTACKING JUDICIAL SALE — INADEQUACY OF PRICE. — Ordinarily, inadequacy of price paid is not alone sufficient cause for setting aside a judicial sale, particularly of personal property of fluctuating value.
5. NO REDEMPTION FROM JUDICIAL SALE OF PERSONAL PROPERTY. — The right of redemption from a judicial sale of personal property does not exist in this state.

14	30
18	65
18	98
14	30
19	218
14	30
7a	134
14	30
19a	511
14	30
20a	498

Appeal from District Court of El Paso County.

ON July 26, 1881, one of the appellees, viz., the Trinidad Gas Company, a defendant below, issued to David H. Irland its certificate of stock No. 25 for fifteen shares of the capital stock of said company, the shares being of the face value of \$100 each, and registered upon the company's books in Irland's name.

ON April 19, 1882, said shares of stock were still standing upon the books of the defendant company in the name of Irland, and on that day the Rifenburg Coal Mining Company, a copartnership composed of the defendants James M. John and Caldwell Yeaman, commenced an action before a justice of the peace, by attachment against Irland, and caused said shares of stock to be attached as the property of said Irland. Such proceedings were thereafter had in said cause that on May 5, 1882, judgment was rendered against Irland, and the shares of stock ordered by the justice to be sold to satisfy such judgment, which was done on May 22, 1882, the defendant John becoming the purchaser thereof at the constable's sale for the sum of \$50.

Prior to the commencement of said attachment suit, viz., on November 22, 1881, Irland had assigned the certificate of stock to appellant Conway, but no assignment or transfer thereof to Conway was ever made upon the books of the defendant company, nor was there any request to have such transfer made until November, 1883, long subsequent to the purchase of said stock at constable's sale by the defendant John. Neither of the appellees had any knowledge or information, prior to November, 1883, that Irland had assigned said certificate, or that the plaintiff, Conway, made any claim thereto. The agreed value of the fifteen shares of stock at the time of the purchase at constable's sale by defendant John is \$550.

This action was brought to set aside this sale, on ac-

count of the alleged invalidity of the judgment of the justice and the inadequacy of the price paid. The plaintiff also seeks, in the alternative, to redeem. The trial below resulted in a judgment for the defendant.

Messrs. WELLS, McNEAL & TAYLOR, for appellant.

Mr. J. M. JOHN, for appellees.

MR. JUSTICE HAYT delivered the opinion of the court.

The attack upon the judgment of the district court sustaining the title of appellee John to the stock in controversy is based upon four grounds:

(1) That the stock was not, at the time of the attachment proceedings, subject to attachment as the property of Ireland, because of the previous assignment to appellant.

(2) That the stock could not be attached upon a writ issued by a justice of the peace.

(3) Irregularities in the proceedings in court, and attending the sale, sufficient, as it is claimed, to avoid the judgment and vitiate the sale.

(4) Inadequacy of the price paid.

It is admitted by the pleadings that the certificate of stock in controversy provided upon the face thereof that it was "transferable only upon the books of the company, in person or by attorney, on the surrender of this certificate." This was inserted by virtue of the following by-law of the company:

"Transfers of stock shall be made on the books of the company either in person or by attorney, and the possession of the script shall not be regarded as evidence of ownership, unless it shall so appear on the books of the company."

Express statutory authority for the making of such by-law is given the corporation in section 241, General Statutes of 1883, in this language: "The shares of stock

shall not be less than ten nor more than one hundred dollars each, and shall be deemed personal property, and transferable as such in the manner provided by the by-laws."

In addition to this, we find a subsequent section, requiring, *inter alia*, that a book shall be kept by the secretary or clerk of such corporation showing the names of all stockholders, with their places of residence, the number of shares of stock held by each, etc., and providing, further, that "no transfer of stock shall be valid for any purpose whatever, except to render the person to whom it shall be transferred liable for the debts of the company, * * * unless it shall have been entered therein, as required by this section, within sixty days from the date of such transfer." Sec. 269, Id.

Here we have a clear provision of statute taking from the owner of stock the right to transfer it in accordance with the known rules of the common law, and substituting therefor another and different mode. This change was doubtless made for the purpose of furnishing record evidence of the title, and, in view of the plain and explicit language employed, the statute cannot be disregarded. Under its provisions, we are clearly of the opinion that, notwithstanding the attempted transfer from Irland to appellant, the stock remained subject to attachment at the suit of the former's creditors. *Fiske v. Carr*, 20 Me. 301; *Bank v. Cutler*, 49 Me. 315; *Bank v. Gridley*, 91 Ill. 457; *Association v. Cory*, 129 Mass. 435; *Northrop v. Turnpike Co.* 3 Conn. 544; *Weston v. Mining Co.* 5 Cal. 186; *Naglee v. Wharf Co.* 20 Cal. 530; *Murphy's Case*, 51 Wis. 519.

We are aware that in some jurisdictions somewhat similar provisions have been held to relate solely to the government of the corporation in the transaction of its corporate business, to advise it of the names of those entitled to vote, receive dividends as stockholders, etc., and that creditors should not be allowed to take advantage of

any failure to comply with such requirements. Such decisions have usually, however, been based upon statutes essentially dissimilar from those here under consideration, and frequently upon the construction to be given a by-law of the company, in the absence of express statutory restriction. But the decided weight of authority, as well as the better reason, we think, unite in support of the conclusion that when, as in this state, the statute of the state, as applicable to corporations, requires that shares shall be transferred in a particular mode, there must be at least a substantial compliance with the requirement in order to protect the property against future assignments or levies. *Bank v. Gridley, supra.*

At the time of these proceedings it was provided by statute that shares of the defendant in any corporation should be subject to be taken upon writs of attachment and sold to satisfy any judgment rendered against the defendant. Sess. Laws, 1879, p. 20. Every detail of procedure necessary to making the levy and sale seems to be fully provided either in this act or by sections 1447 to 1452, inclusive, of the General Laws of 1877. And an examination of the chapter in which these sections occur convinces us that said sections apply as well to attachments issued out of a justice's court as to those emanating from courts of record.

It was shown upon the trial below that the files in the attachment case had been lost, and could not be produced. Oral testimony of the character and contents of the lost papers was therefore properly admitted; and it has been held that, if the record does not show the jurisdiction of the justice, the fact may be proved by evidence *aliunde*. *Liss v. Wilcozen*, 2 Colo. 85; *Hittson v. Davenport*, 4 Colo. 169; *Behymer v. Nordloh*, 12 Colo. 352; *Bacon v. Bassett*, 19 Wis. 54.

There can be no question, under the evidence, in reference either to the form or number of the notices posted in this case; but it is claimed that the evidence failed to

show that such notices were posted in three of the most public places within the precinct, as required by section 20 of the act of 1877. Said section reads as follows: "Sec. 20. Whenever affidavit shall be made that the defendant resides without the state of Colorado, and cannot be found therein, so that service of process cannot be personally had on him, or that he conceals himself or stands in defiance of an officer, with intent to prevent service of process upon him, it shall be the duty of the justice of the peace to cause notice of the attachment to be published by posting three notices of the levy of such attachment, and of the day and hour at which the trial of the cause will be had at his office, in three of the most public places within his precinct. If at the time set for trial the defendant does not appear to defend the action, the justice shall proceed to hear the cause and render judgment, as in cases where the summons has been personally served: provided, that such notices shall be posted at least ten (10) days prior to the day set for trial: and provided further, that the constable shall in such cases retain the summons until the day set for trial, so that personal service of the summons may be had before the day set for trial, if practicable."

The testimony of Judge Yeaman is to the effect that the constable, by his direction, posted the notices; that one of them was posted on the front door of the courthouse, one on the side of the stairs leading to the justice's office, and one on the fence in front of the Park livery-stable *corral*; and the witness further testifies that "these places were then regarded, and would now be, three about as public places as could be found in the precinct." It would certainly be very difficult for a witness to swear positively that three particular places in a town of several thousand people were the most public places in the precinct, and a construction of the statute which would require this to be done would be unreasonable. We think the evidence of the witness, in the absence of showing to the contrary, warranted the court

below in finding that the requirements of the act in this particular had been complied with.

The constable retained the summons for service until the day of trial, while appellant contends that it should have been returned at or before the time of filing of affidavit of non-residence, and an *alias* summons issued. It will be noticed, however, that under this act authority to publish notice of the attachment is derived from the affidavit, and not from the officer's return. The affidavit may be filed before any attempt is made to obtain personal service; and the order may be made at the time of the institution of the suit, or at any time thereafter. The act required the summons to be retained by the officer until the day set for the trial, and we see no objection to the course pursued in this case.

An examination of the evidence shows that all requirements of the statute were closely followed in the proceedings before the justice; and we must therefore hold that the same are valid, at least, as against this collateral attack; and, in obedience to well-established principles, the sale cannot be set aside solely on account of the smallness of the price paid. Ordinarily, inadequacy of price paid is not alone sufficient cause for setting aside a judicial sale, and this is particularly applicable to sales of personal property of fluctuating value. Ror. Jud. Sales, § 854; *Swires v. Brotherline*, 41 Pa. St. 135.

This sale appears to have been fairly conducted at a time and place previously advertised, as required by law. We discover no circumstances tending to impeach the transaction. The ruling of the court below refusing to set aside the sale cannot, therefore, be disturbed. Neither can the courts decree a right of redemption. Such right does not exist, in the absence of statutory enactment conferring it. Ror. Jud. Sales, § 906 *et seq.*; Freem. Ex'ns, § 314 *et seq.* The statutes of this state confer the right only in cases of sales of real estate.

The judgment is affirmed.

Affirmed.

THE LACLEDE FIREBRICK MANUFACTURING COMPANY V.
JOSEPH WILLIAMS ET AL.

14 37
6a 317

ATTORNEY IN FACT — PERSONAL LIABILITY ON CONTRACT WITH STRANGERS.— A power of attorney authorized H. to receive funds becoming due W. from time to time under W.'s contract with Denver to build a sewer; it also authorized H. to disburse the same for labor done and materials furnished under the sewer contract, precisely as W. himself might do. W. made a written contract with L. for sewer pipe, by the terms of which L. was to receive a certain proportion of the price from time to time as the money was paid H. by the city; L. was also to have precedence in payment of the balance due for sewer pipe furnished from a certain percentage of W.'s compensation retained by the city until completion of the sewer. H. indorsed upon the contract for pipe his written acceptance thereof, stipulating, however, that such acceptance should be construed according to the terms of his power of attorney from W. *Held*, that H. was liable for a failure to carry out the terms of the sewer-pipe contract, allowing precedence in payment of the balance due thereon from the percentage reserved and paid him upon final acceptance of the sewer.

Error to District Court of Arapahoe County.

IN the year 1882 defendant in error, Joseph Williams, contracted with the city of Denver to construct what is known as the Twentieth-street district sewer. By the terms of this contract, at stated intervals as the work progressed, the city engineer was to make estimates of the value of the work done thereunder; eighty per cent. of the amount represented by each of these estimates was to be at once paid by the city; the remaining twenty per cent. was to be withheld as a guaranty until the final completion and acceptance of the sewer.

Williams was required to give bond, and for the purpose of securing his bondsmen he executed to John W. Horner, who was one of said bondsmen, an irrevocable power of attorney, in words and figures as follows:

“Know all men by these presents that I, Joseph Williams, of the city of Denver, in the county of Arapahoe, and state of Colorado, do hereby make, constitute and

appoint John W. Horner, of the city of Denver, in the county of Arapahoe, in the state of Colorado, my true, sufficient and lawful attorney, irrevocable, for me and in my name to receive, receipt for and take from the city of Denver all warrants or other evidences of indebtedness that may become due me for work done or to be done, materials furnished or to be furnished, or otherwise that may become due me under my contract with the city of Denver for the construction of the Twentieth-street district sewer, in the city of Denver aforesaid, and to see to or negotiate and sell said evidences of indebtedness or warrants for the best price that can be obtained therefor at the time, and apply the proceeds thereof or see that the proceeds thereof are applied to the payment for the materials used in the said district sewer, and the labor that may be employed in the performance of the work necessary to construct said sewer.

“The intention of this instrument being the protection of the parties interested in the construction of said district sewer, including the bondsmen of the party of the first part, the city of Denver, and the parties furnishing materials and labor for the construction of said district sewer.

“Hereby giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I myself might or could do, if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

“In witness whereof I have hereunto set my hand and seal, this 27th day of April, A. D. 1882.

[Signed] “JOSEPH WILLIAMS. [SEAL.]”

Williams entered into a written contract with plaintiff in error to furnish sewer pipe for use in the construc-

tion of said sewer. This contract contained the following, among other provisions:

“Said herein-named material shall be in accordance with the requirements of said second party’s contract with the said city of Denver as per specifications relating thereto furnished to first party hereto; and the second party agrees to and with the first party to receive the material herein mentioned, and shipped according to the terms of the contract, on board cars at the works of first party, in accordance with the terms of bills of lading, taken by the first party, in the usual manner and form, and to pay for the same as follows: Eighty per cent. of the amount of material furnished under this contract, included in city engineer’s monthly or other estimate, shall be paid to John W. Horner, of Denver, *acting as trustee*, by agreement of the parties hereto, within thirty days after the delivery of the warrant for any such estimate, who shall, without delay, pay over any such amount to first party, either by sight draft payable to first party’s order in St. Louis, or by a legal warrant of said city of Denver, at par value, properly issued and presented to the city treasurer, so that any such warrant will bear ten per cent. interest per annum from the date thereof until paid.

“And it is further understood and agreed by and between the several parties hereto, and by John W. Horner, *acting as trustee for the parties hereto*, that in consideration of first party’s agreement to receive eighty per cent. of value in part payment of the material furnished under this contract, as the same may be estimated upon at any time by the city engineer of the said city of Denver, that said first party shall have a special lien upon the twenty per cent. retained by the said city of Denver out of all estimates under the contract of said second party with the said city of Denver, for the construction of the said Twentieth-street district sewer, for the purpose of securing said first party in the full payment of

any claim that may be due to said first party by said second party under the provision of this contract; and inasmuch as said John W. Horner holds a power of attorney from said second party, authorizing him to collect all moneys or other things that may be due said second party under said contract with said city of Denver, as therein fully set out:

“It is agreed between the respective parties hereto (said John W. Horner assenting) that said John W. Horner shall, *out of said twenty per cent. as and when the same shall come into his hands under said power of attorney, pay to said first party in full any amount in any manner accruing to first party* from said second party, under this contract, it being the intention of this contract that said twenty per cent. of all estimates retained by said city of Denver, under second party's contract therewith, or as much thereof as may be necessary therefor, shall, upon receipt thereof by said John W. Horner, under said power of attorney, be held and deemed to be for the use and benefit of said first party, for the purpose of paying in full all claims of said first party against said second party that may arise in any manner under this contract.

“It is further agreed between the parties hereto that for any amounts unpaid out of the monthly or other estimates of the city engineer of the city of Denver, for material shipped in accordance with the provisions of this contract, and included in said estimates, that said first party shall be entitled to interest upon any such amounts or part thereof, remaining unpaid after thirty days from date of estimate, at the rate of ten per cent. per annum until paid in accordance with this contract.”

Upon said contract appears the following indorsement by Horner:

“I hereby accept the aforementioned trust, created by the parties in the foregoing contract, according to the true tenor and effect of said contract, and will perform

the same according to the true tenor and effect thereof, construed with the power of attorney given me by Joseph Williams, party of the second part, to collect and disburse the proceeds arising from this contract with the city of Denver, referred to in said contract.

“JOHN W. HORNER.

“*Denver, Colorado, June, 1882.*”

Williams in due time completed the work to the satisfaction and acceptance of the city. All moneys due him in pursuance of his contract with the city, including the reserved twenty per cent., were paid to Horner, who claims to have disbursed the same in accordance with the power of attorney.

Plaintiff in error furnished most of the sewer pipe used; it received from Horner eighty per cent. of the contract price therefor, as the same was from time to time paid by the city according to the estimates of the city engineer. But there remained a balance of \$1,897.32 due plaintiff in error from Williams under the contract.

To recover the foregoing balance, the present action was brought against Williams and Horner. The cause was tried to the court without a jury, and judgment was duly entered against Williams for the amount mentioned, together with the accrued interest. But the court found in favor of defendant Horner and entered judgment dismissing the complaint as to him. To this judgment exceptions were duly taken, and the questions thereby raised are adjudicated in the following decision.

Mr. T. D. W. YONLEY, for plaintiff in error.

Messrs. L. P. MARSH and J. W. HORNER, for defendants in error.

CHIEF JUSTICE HELM delivered the opinion of the court.

Upon the facts in the present case there is no substantial conflict of testimony. It does not appear that

Horner has remaining in his hands any money or evidences of indebtedness paid by the city in connection with the Twentieth-street district sewer; nor is any intentional fraud on his part shown in the disbursement of this fund. Therefore, the question of his liability in the present case must be answered by construction of the written instruments under which he acted.

The contract between Williams and the Laclede Company clearly provided: That the company was to receive from Horner eighty per cent. of the price agreed upon for sewer pipe delivered and used whenever, from time to time during the prosecution of the improvement, the city paid Horner, upon estimates of the city engineer, eighty per cent. of the amounts due Williams from the city; that the company should have a lien for the balance of its claim upon the remaining twenty per cent. retained by the city under its contract with Williams until the completion of the sewer; and that out of this twenty per cent. the company should be paid by Horner its balance in full as soon as the latter fund came into his hands.

Horner indorsed upon the contract his written acceptance thereof; he thereby became a trustee for the company, and obligated himself to comply with the foregoing terms and conditions, unless such compliance was in some way qualified or limited. In his written indorsement accepting the trust Horner declared that he would perform the contract "according to the true tenor and effect thereof, *construed with the power of attorney given [him] by Joseph Williams. * * **" We shall assume, without discussion, that this language operated to render Horner's compliance with the agreement subject to any limitation of his authority contained in the power of attorney through which he became Williams' financial agent in the premises. It therefore becomes necessary to briefly notice the latter instrument.

The power of attorney authorized Horner to receive the

warrants and other evidences of indebtedness coming to Williams under the latter's contract with the city, to exchange the same for money on the best terms possible, and with the proceeds to liquidate the claims against Williams for work performed and materials furnished in constructing the Twentieth-street district sewer. By the very terms of the instrument, Horner, in receiving and disbursing the money in question, was placed as nearly as possible in the position occupied by Williams, and vested with the precise power and authority that Williams himself would have exercised had no one been selected to act in his stead. He was not required to distribute the funds *pro rata* among the workmen and material-men; nor were preferences among creditors forbidden. If the money coming into Horner's hands by virtue of Williams' contract with the city should prove insufficient to pay all the claims in connection therewith, he might discriminate in favor of one claimant and against another; he could pay all that was due the workmen and leave the material-men partially unpaid; or he might pay the entire claim of one material-man and a portion of the claim of another. Whatever Williams could legally have done in this regard Horner was empowered to do. That this was Horner's belief at the time is evidenced by the fact that he paid a part of the creditors, viz., the workmen, in full, leaving others, including the Laclede Company, partially unsatisfied.

We discover in the power of attorney no inconsistency with Williams' agreement as to the mode of paying and securing the purchase price of the Laclede Company's sewer pipe. And upon Horner's acceptance of the trust he became a party to this portion of the contract for pipe, and bound himself to comply with its terms. If he did not intend to do so, he should have declined acceptance; for, under the circumstances, it is fair to presume that his conduct induced the company to make the agreement with Williams and to part with its property.

No brief has been filed by defendant in error, and we are not advised of the theory upon which the court below proceeded; but, according to our view, under the pleadings and evidence as presented by the present record, Horner, as well as Williams, should have been held liable.

The judgment is accordingly reversed and the cause remanded for a new trial.

Reversed.

MR. JUSTICE ELLIOTT, having presided at the trial below, did not participate in this decision.

SCHWARZ ET AL. V. COUNTY COURT OF GARFIELD COUNTY
ET AL.

1. ELECTION CONTEST — REQUIREMENTS OF STATEMENTS AND COUNTER-STATEMENTS OF THE PARTIES TO THE ACTION — CONSTRUCTION OF STATUTE.— A proper construction of the act of 1885 (Laws 1885, p. 197), providing for contesting the election of county officers, requires each party to give the other notice, in the statements filed, of the names of such persons as he claims illegally voted for his competitor, and those whose votes for himself were illegally rejected.
2. JURISDICTION OF COUNTY COURT.— The statements required by the statute are necessary to give the courts jurisdiction; and where no effort is made by the contestor to comply with the requirements of the act in this regard, and a plea to the jurisdiction of the court is interposed by the contestee, setting up such defect, the court is without jurisdiction to proceed with a trial upon the merits. The statute furnishes a complete system of procedure within itself, and before a contestor can legally invoke the jurisdiction of the court he must state the facts required to bring his case within the purview of the statute.
3. ATTEMPT TO EXCUSE OMISSIONS IN STATEMENT.— The omission to furnish the list of names required by statute cannot be justified by subsequently alleging that the information necessary to prepare the same was in the hands of contestee, by whose fraud and violence contestor was prevented from obtaining it, when no effort was made in the first instance to either comply with the statute or to excuse the failure.

14	44
16	464

14	44
23	393
9a	42

14	44
11a	150

14	44
26	480

14	44
27	440
15a	345

14	44
28	220

4. UNSEASONABLE OFFER TO AMEND STATEMENT.— Where it does not appear that any attempt has been made to comply with the statutory requirement by furnishing the list, and no excuse is offered for failing to do so, amendment of the petition for that purpose, at a late day in the proceedings, is unwarrantable, in the absence of a statute directly authorizing its amendment.
5. WRIT OF CERTIORARI — WHEN PREMATURELY ISSUED WILL BE QUASHED.— It is only the final determination of an inferior tribunal which can be reviewed upon a writ of *certiorari*. When it is sought to review thereby orders and proceedings in a cause preliminary to final judgment the writ will be quashed.

Certiorari to County Court of Garfield County.

Messrs. M. J. BARTLEY and JOSEPH W. TAYLOR, for petitioners.

Messrs. C. W. DARROW, J. W. DOLLISON and E. H. WATSON, for respondents.

MR. JUSTICE HAYT delivered the opinion of the court.

This controversy arose out of an election for municipal officers of the town of Glenwood Springs, held in April, 1889. The cases were recently before this court upon an appeal from a judgment rendered by the district court of Garfield county, to which court the cases had been removed from the county court by writ of *certiorari*. The district court, being of the opinion that county courts in the state had no jurisdiction of contests growing out of municipal elections, perpetually prohibited the county court of Garfield county from further proceeding with these contests. Upon appeal, this court held that such jurisdiction was conferred upon the county courts of this state by statute, and accordingly reversed the judgment of the district court. 13 Colo. 291.

It was then urged that the county courts in this state had no power to entertain jurisdiction of any contest for municipal offices. Such general power is now conceded, but it is claimed that the county court of Garfield county is without jurisdiction in these particular cases on account

of the insufficiency of the statements upon which the proceedings are based. It will thus be seen that the question now presented for our determination is entirely different from the one decided upon appeal.

These cases, which have been consolidated by stipulation of counsel, affect all the municipal officers of said town declared by the canvassing board to have been elected, viz., one mayor and six trustees. The contests are founded upon the claim that at said election a large number of illegal votes were cast for the parties to whom certificates of election were issued, and that such illegal votes were sufficient to change the result of the election. The particular defect relied upon to defeat the jurisdiction of the county court consists in the omission from the statements of the names of the persons whom it is claimed cast the illegal votes. That court having decided against contestee's pleas to its jurisdiction, and being about to proceed with the trial of the contests upon their merits, we are asked to interfere by *certiorari*.

The three principal questions presented for our determination may be stated as follows: (1) The reception of illegal votes being relied upon as a cause of contest, should the names of the persons who so voted be given in the petition? (2) If such names are omitted, is such omission fatal to the maintenance of the contests? (3) The court being about to proceed upon a petition thus defective, can such contemplated action be prohibited upon *certiorari*?

A reference to the statute under which these contests were instituted is the only answer necessary to the first of these propositions. In section 15 of the act it is provided: "When the reception of illegal or the rejection of legal votes is alleged as a cause of the contest, a list of the number of persons who so voted, or whose votes were rejected, and the precinct or ward where they voted, or offered to vote, shall be set forth in the statement of contestor, and shall likewise be set forth in the

answer of contestee, if any such cause is alleged in his answer by way of counter-statement." Sess. Laws 1885, p. 197.

Although a slight ambiguity exists, the evident purpose of this statute is to require each party to give the other notice of the names of such persons as he claims illegally voted for his competitor, and of those whose votes for himself were illegally rejected. *Norwood v. Kenfield*, 30 Cal. 393; *Griffin v. Wall*, 32 Ala. 149.

The command of the act cannot be ignored; and if, as now contended by counsel, the omission to comply therewith arose from the fact that they were prevented from securing the information necessary to the making of such lists, by the fraud and violence of contestees and those under their control, or if, by any other unlawful act of contestees, contestors were prevented from obtaining the information necessary to prepare such lists, such facts should at least have been alleged in excuse in the first instance, in order that contestors may take advantage thereof. How far the court might be permitted to excuse the failure, had this been done, we need not determine, as in none of the statements before us was there any attempt either to comply with the statute or to offer any excuse for non-compliance. The proceedings upon an election contest before the county judge, under the statute, are special and summary in their nature; and it is a general rule that a strict observance of the statute, so far as regards the steps necessary to give jurisdiction, must be required in such cases. The act under which these contests were instituted not having been complied with in the particular mentioned, the statements filed as the basis of the proceedings are radically defective. *Sedg. St. & Const. Law*, 299; *Dorsey v. Barry*, 24 Cal. 449; *Casgrave v. Howland*, id. 457; *Norwood v. Kenfield*, *supra*; *Loomis v. Jackson*, 6 W. Va. 613; *Buckley v. Lowry*, 2 Mich. 418.

The act is not only special in character, but it furnishes

a complete system of procedure within itself. It requires that such contests shall be tried and determined by the county judge of the county in which the contests arise. It provides for a written statement as the basis of the proceedings, and designates what it shall contain, and the officer with whom it shall be filed. It designates the officer by whom the summons shall be issued, and provides the time and manner of making up the issues. Provision is also made for fixing the time of trial, and for the form of judgment to be entered, etc. As we have seen, the jurisdiction of the court, under such a statute, depends entirely upon the terms of the act, and consequently, before contestors can invoke such jurisdiction, facts must be stated by them which bring the cases within the purview of the act. In these statements, while the board of registration is charged with fraudulently permitting the names of those not entitled to vote to be registered, the *gravamen* of complaint in each case is that sufficient illegal votes were received and counted for the contestee to change the result of the election; and, unless this can be maintained as a cause of contest, contestors must fail; and yet no attempt has been made to comply with that portion of the act requiring a list of the number of persons who so voted, with the precinct or ward where such votes were cast, to be set forth in the statement. It is reasonable to conclude that the legislature in enacting this requirement had in view the fact that by previous legislation the utmost care had been exercised to provide for the casting of the ballots and the integrity of the count; and it is certainly not unreasonable to require those who desire to contest the right of a person to an office to which he has been declared duly elected by the tribunal provided by law to determine that question, to state with reasonable certainty and precision the cause upon which they rely to overthrow such result. We cannot say that the provision of the statute of 1885, under consideration, is unrea-

sonable, and, if it were, relief must be looked for from the legislature, and not from the courts.

The court below should have sustained the pleas to its jurisdiction based upon the failure to include in the statements the lists required by the statute. *Faribault v. Hulett*, 10 Minn. 38 (Gil. 15); High, Extr. Rem. § 781; *Keller v. Chapman*, 34 Cal. 635; *Garretson v. County of Santa Barbara*, 61 Cal. 54; *Quimbo Oppo v. People*, 20 N. Y. 531.

It is claimed that the defects in the statements may yet be supplied by amendment, although there is no provision of the act directly authorizing amendments. Even if the power exists in the court to permit amendments after the time for filing the statement has expired,—a point we do not decide,—still these statements contain nothing that can be taken as an attempt to comply with the statutory requirement in reference to giving a “list;” and, since no excuse is offered for the failure in this particular, we think it would be unwarrantable at this late day, when the terms of office for which some of the contestees were declared elected have nearly expired, to permit amendments so radical in character as those that would be necessary to supply the defects in these statements. During all the time these cases have been pending, contestors have insisted upon standing by the sufficiency of the pleadings filed as the basis of these proceedings, making no application to amend that can be considered by the court. Under these circumstances, we are of opinion that leave to amend should not be granted.

As this is the second time these cases have been before this court, and the foregoing questions have been argued at length by counsel, we have felt constrained to fully decide them. The writ of *certiorari* must, however, be quashed, for the reason that application therefor was prematurely made; the order sought to be reviewed being merely preliminary, and in no sense a final order or de-

termination. While it is not necessary to wait until a judgment or order entered without jurisdiction is carried into effect, still it is only the final determination of an inferior tribunal that can be reviewed upon *certiorari*; the writ being never used to review merely preliminary proceedings like those presented upon this application. Hayne, New Trial & App. 917; *People v. County Judge*, 40 Cal. 479; *Lynde v. Noble*, 20 Johns. 79; *Haines v. Backus*, 4 Wend. 213; *Railroad Co. v. Whipple*, 22 Ill. 105; *People v. District Court*, 6 Colo. 534.

The writ of *certiorari* heretofore issued herein is accordingly quashed.

Writ quashed.

MR. JUSTICE ELLIOTT. I concur in the construction given to the election contest statute by the foregoing opinion. In my judgment, however, so much of the rule or order of this court granting the writ as commanded the county court to desist from further proceedings in said election contest cases until the further order of this court in the premises should be made absolute.

MCKENZIE ET AL. V. McMILLEN.

JUDGMENT ON CONTRACT — WHEN APPEAL UNAVAILING. — Where judgment is regularly entered upon a personal contract, and upon sufficient evidence to support it, and no evidence is produced in support of the defense relied on, an appeal from the judgment is unavailing.

Appeal from District Court of Lake County.

Mr. N. ROLLINS, for appellants.

Messrs. W. H. NASH and R. D. THOMPSON, for appellee.

RICHMOND, C. This was a suit upon a promissory note payable to Mrs. Marie Conolly, for the sum of \$300, with

interest at the rate of four per cent. per month until paid. It was assigned to plaintiff for a valuable consideration, and judgment entered, from which this appeal is prosecuted.

Appellants' contention is that the note was first indorsed to McMillen Bros., and subsequently this indorsement was erased, and the name of Neil McMillen substituted, after suit was brought, without the knowledge or consent of the payee. There is not a particle of proof to support this position, and ample evidence to warrant the findings and judgment of the court. Judgment should be affirmed.

PATTISON and REED, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

Affirmed.

SIMONTON ET AL. V. ROHM ET AL.

14 51
18a 182

1. OBJECTIONS TO PLEADINGS MUST BE SEASONABLY MADE.— An objection that the individual names of the defendants as copartners are not set out in the complaint, appearing for the first time at the close of plaintiff's evidence, is not seasonably made.
2. ISSUES OF FACT — PROVINCE OF JURY.— The weight of the evidence and the credibility of the witnesses are matters of which the jury are the proper judges.
3. INSTRUCTIONS SUBSTANTIALLY CORRECT NOT CAUSE FOR REVERSAL. Though some of the instructions, separately considered, be not as perfect and accurate in form as they might be, nevertheless, if the charge as a whole fairly submits the questions at issue for the determination of the jury upon the evidence, the verdict should not be disturbed.

Appeal from Eagle County Court.

Messrs. P. F. QUINN and R. D. THOMPSON, for appellants.

Messrs. BROWN & GLENN and BELFORD & WIKOFF, for appellees.

MR. JUSTICE ELLIOTT delivered the opinion of the court.

This was an action of unlawful detainer, commenced by R. L. and G. L. Rohm, plaintiffs, against T. H. Simonton & Co., defendant, before a justice of the peace. It was appealed to the county court, where it was tried to a jury, resulting in a verdict and judgment for plaintiffs. The defendant appeals to this court.

The objection that the individual names of the defendants as copartners are not set out in the complaint appears for the first time at the close of the plaintiffs' evidence in the county court. This was in the nature of an objection on the ground of a defect of parties defendant, and, as such, was not seasonably made.

The principal controversy at the trial related to the issues of fact made by the pleadings, as follows: The complaint avers in substance that Simonton entered the premises of plaintiffs as a monthly tenant. This averment is traversed by the answer, in which it is also averred that the defendants entered under a written lease for the period of two years. The replication denies the entry under a lease for two years. The testimony was conflicting. R. L. Rohm testified in behalf of plaintiffs, as shown by the abstract, as follows: "Mr. Simonton came to me some time in October, or the 1st of November, 1884, and wanted to rent the store from month to month. I told him he could have it at \$35 per month. He said he would give me \$30 in advance. I let him have it at \$30 per month. There was no stated time."

This evidence tended to sustain the complaint. The weight of the evidence, and the credibility of the witnesses, were matters of which the jury were the proper judges. The court properly charged the jury to the effect that, if they believed from the evidence that a lease was made by plaintiffs to defendants from month to month at the rate of \$30 per month, they should find for plaintiffs; also, that defendant, having affirmatively

pleaded a written lease for two years, must prove the same by a fair preponderance of the evidence, in order to warrant a verdict in his favor on that ground.

While some of the instructions, separately considered, are not as perfect and accurate in form as they might be, nevertheless, the charge, as a whole, fairly submitted the questions at issue for the determination of the jury upon the evidence, and the verdict should not be disturbed. The judgment of the county court is accordingly affirmed.

Affirmed.

LOVELOCK V. GREGG.

1. EVIDENCE — BURDEN OF PROOF. — Where plaintiff's claim for wages as sued for was admitted, defendant was properly required to assume the burden of proving payment.
2. BOOK ENTRIES — WHEN PROPERLY EXCLUDED. — Where the entries in a book of account were made a week or more after the transactions occurred to which they related, and where the book of account was mutilated by the book-keeper cutting out the leaves on which the account was kept, the book was properly excluded as evidence.

Appeal from Boulder County Court.

Mr. J. M. NORTH, for appellant.

Mr. C. M. CAMPBELL, for appellee.

MR. JUSTICE ELLIOTT delivered the opinion of the court.

Appellee Gregg was plaintiff below. The action was originally brought in a justice's court, where plaintiff recovered judgment for wages due her as a dressmaker. Upon appeal and trial by the county court without a jury, plaintiff again recovered judgment for the sum of \$51.40, interest and costs. Upon appeal to this court it is assigned for error that the judgment should have been

in favor of defendant instead of plaintiff, and also that the court erred by admitting in evidence the book of account of plaintiff, and by excluding the book of account of defendant.

Counsel for appellant cites no authorities, and makes but slight argument, in support of the assignments of error. The plaintiff's claim for wages as sued for was admitted, and defendant was properly required to assume the burden of proving payment. The evidence shows that plaintiff's book of account was kept in a manner entitling it to be admitted in evidence as a book of original entry. But defendant's book of account was not so kept. The entries therein were made several days, and sometimes a week or more, after the transactions occurred to which they related. Besides, the book was mutilated by the cutting out of the leaves on which the account was kept. This was done by the husband of defendant, acting as her book-keeper. The court did not err in its rulings upon either of these questions. Upon careful examination, the finding and judgment of the trial court appear to be well sustained by the evidence. We are of the opinion that the litigation should not have been extended beyond the trial in the county court. The judgment of the county court is accordingly affirmed, with costs.

Affirmed.

SAUER V. TOWN OF NEVADAVILLE.

14	54
19	125
19	200

14	54
135	9

1. GARNISHMENT — LEGAL STATUS OF GARNISHEE. — Under no circumstances shall a garnishee, by the operation of the proceedings against him, be placed in any worse condition than he would be in if the defendant's claim against him were enforced by the defendant himself.
2. MUNICIPAL CORPORATION AS GARNISHEE — WHAT MAY BE SHOWN IN DISCHARGE OF LIABILITY. — When an incorporated town is summoned as garnishee on account of salary due one of its officers, the town may show in discharge of its liability that the officer is a

collector of its taxes, and, as such, has received money of the town, which he insists upon retaining, equal to the amount of salary due him. It is not to be inferred, however, that the officer has a right to insist upon retaining money under such circumstances; for the right of election to treat money in the hands of a receiver of the public revenue as a simple contract debt or as a trust fund is with the municipality, and not with the collecting officer.

Appeal from Gilpin County Court.

Mr. W. F. FULLERTON, for appellant.

Mr. CHASE WITHROW, for appellee.

MR. JUSTICE ELLIOTT delivered the opinion of the court.

The appellant, Otto Sauer, was plaintiff below. Having obtained judgment against James C. Bartle for the sum of \$109.11 and costs, he served notice and sought to charge the incorporate town of Nevadaville as garnishee of the defendant Bartle. The town answered to the effect that Bartle held the office of marshal of said town, and that \$80 on account of salary was due him about the time of the garnishment, but that, by virtue of his office, Bartle had at the time in his hands certain money belonging to the town which he had collected as taxes, amounting to \$91; that there was no contract or arrangement between the town and Bartle by which he could pay himself out of the money so collected, but that the town knew he had been accustomed to use such money by way of salary before, and had never objected to it; that immediately after the garnishment Bartle had notified the town that he would hold the money in his hands to the extent of his monthly salary; and so it is alleged that the town was not and is not indebted to the defendant Bartle in any sum of money whatever.

Upon the hearing between the plaintiff and the garnishee it was admitted that Nevadaville was a duly incorporated town of Gilpin county, Colo., and also that

the ordinances of the town provide: "That the town treasurer of said town shall disburse the town funds, only upon the warrants of the town recorder, countersigned by the mayor of the board of trustees." "The town marshal shall, before entering upon the duties of his office, execute his bond to the town of Nevadaville, with two sureties, to be approved by the board of trustees, in the sum of \$300, conditioned that he will faithfully and impartially discharge the duties of his office as required by ordinance or by the laws of Colorado; and he will, as often as once in thirty days, and on Saturday preceding the regular monthly meeting of the board of trustees, pay to the town treasurer all moneys by him collected from fines, penalties or other sources, and belonging to said town; and that he will, at the expiration of his term of office, turn over to his successor in office all books, papers and other property belonging to said town, as soon as he shall be elected and qualified."

The matter being submitted upon the answer and admissions aforesaid, the court rendered judgment discharging the garnishee. The plaintiff appeals under the act of 1885.

Under the statute in force at the time this case was tried in the court below, every municipal corporation was subject to the process of garnishment. It is unnecessary to consider whether or not the salary due an officer of an incorporated town could have been taken by such process, for the reason that the liability of Bartle was one for which the town could have maintained an action against him for money had and received to its use. So, also, in an action by Bartle against the town for the \$80 due him on account of salary, the \$91 which he had received by the collection of taxes would be a proper set-off; hence it is a good defense in favor of the town as garnishee. It must not be inferred from this that the converse of this proposition can be maintained; for in an action by the town to compel Bartle to pay over

the money he had collected as taxes, and held in trust for the town, he might not be entitled to set off the amount due him on account of salary. The right of election to treat money in the hands of a receiver of the public revenue as a simple contract debt or as a trust fund is with the municipality, and not with the collecting officer. Code 1883, § 104; Gen. St. § 1561; Drake, Attachm. § 683 *et seq.*; Wade, Attachm. § 447; *Donelson v. Inhabitants of Colerain*, 4 Metc. 430; *City of New Orleans v. Finnerty*, 27 La. Ann. 681; *Lewis v. Dubose*, 29 Ala. 219.

"It is an invariable rule," says Drake, Attachm. § 462, "that under no circumstances shall a garnishee, by the operation of the proceedings against him, be placed in any worse condition than he would be if the defendant's claim against him were enforced by the defendant himself." The reasonableness of this rule and its application to the present case are apparent. It would certainly be a great hardship if the town could, by reason of a controversy between plaintiff and defendant in which it has no interest, be subjected to a liability to the former, to whom it is under no obligation whatever greater than it is under to the latter, with whom it is in direct privity.

It is urged by counsel for appellant that the town should be compelled to pay over the \$80 to plaintiff, and then resort to an action against the marshal and his sureties to recover the \$91. This would impose the burden, expense and uncertainty of litigation upon the garnishee, besides causing the sureties of the marshal to suffer unnecessarily. The obligation of their bond is to secure the town from loss on account of the official misconduct of their principal; they did not undertake that he should pay his debts to other people.

It follows from the foregoing that any defense which the town of Nevadaville could successfully interpose as a bar to an action by Bartle for his salary is equally available against the plaintiff as an answer to the process

of garnishment. Since the amount in the hands of Bartle exceeded his claim for salary, the answer setting forth these facts was sufficient to defeat the garnishment. The judgment of the county court discharging the garnishee was therefore correct, and it is accordingly affirmed.

Affirmed.

JACKSON V. HAMM.

14	58
3a	448
14	58
20	238
14	58
5a	484
14	58
37	157

1. ACTION BY ASSIGNEE OF CHOSE IN ACTION — NOTICE TO DEBTOR, WHEN NOT NECESSARY TO COMPLETE ASSIGNMENT.— Notice to the debtor by the assignee of a chose in action is not necessary to complete the assignment, where there is no controversy between different assignees or attaching creditors of the fund assigned.
2. RIGHT OF ASSIGNEE TO MAINTAIN SUIT IN HIS OWN NAME — RECORD MAY BE AMENDED WHEN ACTION BECOMES FOR USE OF ANOTHER PARTY.— The assignee of a claim against the receiver of a railway company, having obtained permission from the proper court, may, under the code, bring suit in his own name, and, though the assignment be indorsed to another, he may still maintain the action in his own name so long as he retains possession of the instrument of assignment, and may cause the record to be amended by adding the name of the indorsee as the use party, who will thereafter be entitled to control the proceedings, and will be bound by the judgment.

Appeal from Chaffee County Court.

WOLCOTT & VAILE and WATSON & LIBBY, for appellant.

Mr. J. W. HAMM, for appellee.

MR. JUSTICE ELLIOTT delivered the opinion of the court.

This action was commenced by John W. Hamm, as plaintiff, against William S. Jackson, as receiver of the Denver & Rio Grande Railway Company, before a justice of the peace, to recover a certain sum of money due to

one E. D. Lynch, an employe of said railway company, for services. Lynch had assigned his claim to plaintiff, as follows: "Salida, Colo., February 27, 1886. J. W. Gilluly, Esq., Cashier D. & R. G. R'y Co., Denver, Colo.: Please pay, or cause to be paid, to John W. Hamm, the sum of seventy-five dollars and fifty cents, the amount due to me by said railroad company for services; and this shall be your receipt for same in full. E. D. LYNCH." Judgment for the amount of the claim was rendered in the justice's court in favor of plaintiff. The defendant appealed to the county court, where the same judgment was again rendered. Defendant now appeals to this court.

That Jackson was the receiver of the railway company, that Gilluly was its cashier and disbursing agent, that the wages were due to Lynch as sued for, and that Lynch assigned his claim to plaintiff, are in no way controverted by the brief and argument of appellant under its assignment of errors. Gilluly refused payment to Lynch on the ground that he had not paid his board-bill to one A. L. Dodge; but it does not appear that the supposed indebtedness of Lynch for board was in any way connected with his contract or claim for services, or that there had been any garnishment proceedings therefor. This defense was not attempted at the trial. No evidence was offered in behalf of defendant in either court, and nothing is claimed on this ground upon this appeal. It is urged, however, by appellant's counsel, that, as there is nothing in the record to show that the receiver had notice of the assignment of Lynch's claim to plaintiff before the bringing of this suit, therefore the assignment was not complete, and that this action cannot be maintained. If this were a controversy between different assignees or attaching creditors of the same chose in action, this point might require greater consideration. So, also, this appeal might be more difficult of determination but for the fact that the assignment of errors is restricted to

the grounds stated in the motions to dismiss and for nonsuit, respectively, and that even some of these grounds are abandoned in the brief and argument of counsel. Neither of the aforesaid motions question the sufficiency of the evidence generally, nor the merits of the claim sued on, as above stated. *Smith v. Christian*, 47 Cal. 18; 2 White & T. Lead. Cas. 794 *et seq.*; *Clodfelter v. Cox*, 1 Sneed, 330; *Moore v. Gravelot*, 3 Ill. App. 442.

In this action there are no third parties making claim to this fund, nor did defendant interpose any defense of that kind. Besides, plaintiff had given notice of the assignment to Gilluly, the financial agent of the railway company, before the commencement of the action, who made no objection thereto, except that Lynch had not paid his board to Dodge; and, moreover, plaintiff had obtained an order from the United States circuit court, which appointed the receiver, to bring this very action before instituting the same. The order specified the plaintiff as the assignee of the claim of \$75.50 due Lynch, an employee of said railway company.

It appears that plaintiff gave his own due-bill to Lynch for the amount of his claim, in consideration of the assignment, and that Lynch assigned this due-bill of plaintiff to one J. M. King, and in this way got his money. It appears, also, that plaintiff, by indorsement, made the assignment which he had received from Lynch payable to King or his representatives, and caused the record to be amended so as to read, "John W. Hamm, for the use and benefit of J. M. King." It does not appear that these matters in any way prejudiced the defendant. The cause of action remained unchanged. The defense of the unpaid board-bill or any other subsisting equity in favor of defendant against Lynch was as available against Hamm, or even King, as the assignee of Lynch, as it would have been if Lynch had been plaintiff; besides, there was no plea or offer to prove any defense as against Lynch. 1 Pars. Cont. 229; Code Civ. Proc. § 4;

2 White & T. Lead. Cas. 780-811; *Reeve v. Smith*, 113 Ill. 47.

Hamm, being the real party in interest, was entitled to sue in his own name by the express provision of the code, as well as by the order of the circuit court which he had obtained. The indorsement to King of the Lynch assignment did not necessitate a dismissal of the action by Hamm, so long as he retained possession of the instrument, and while his own absolute and unconditional obligation which he had given in exchange therefor was still outstanding. But even if King did become the real party in interest by such indorsement, in the absence of anything in the record to the contrary, we must presume that the adding of his name as the use party was duly authorized; and hence, upon familiar principles, he was thereafter entitled to control the proceedings, and was bound by the judgment. Thus the defendant and the railway company are abundantly protected. 1 Greenl. Ev. § 535; *Chapman v. Shattuck*, 3 Gilman, 49; *Morris v. Cheney*, 51 Ill. 451; *Chadsey v. Lewis*, 1 Gilman, 153; *Van Camp v. Commissioners*, 2 Pac. Rep. 721; 1 Pars. Cont. 223-230; *Jessel v. Insurance Co.* 3 Hill, 88; *Palmer v. Merrill*, 6 Cush. 282; *Bartlett v. Pearson*, 29 Me. 9; *Elliot v. Threlkeld*, 16 B. Mon. 341.

This disposes of the assignment of errors, so far as they have been presented by counsel in their briefs, in favor of appellees. The judgment of the county court is accordingly affirmed.

Affirmed.

NICHOLS ET AL. V. JONES ET AL.

1. PLEADINGS IN CIVIL ACTIONS — WAIVING DEFECTS THEREIN. — Where the complaint is verified by one of plaintiffs' attorneys, but no reason why it is not verified by the parties is stated, as required by the Civil Code, such defect is waived when defendants make no objection to the verification in the court below, and file an answer

duly verified, as to some of the defenses, and not verified as to others.

2. PRACTICE—STRIKING OUT UNVERIFIED PORTIONS OF ANSWER.—

Where the answer contains several defenses, some of which are verified and others not, it is not error to strike out the unverified portion of the answer, with leave to defendants to further answer as to such portion if they should so desire.

3. SAME—WHEN A DEFENSE MAY BE TREATED AS INSUFFICIENT.—

Where a defense set up in the answer is ordered stricken out, which by some error is not done, and the court afterwards correctly treats the defense as insufficient to raise an issue, defendants cannot complain.

Appeal from District Court of Gunnison County.

THE transcript of record does not contain the original complaint filed in the district court. By the amended complaint, A. E. Jones and W. J. King, partners doing business under the firm name and style of Jones & King, were made parties plaintiff, and Ira Nichols and H. N. Nichols and S. L. Townsend, partners under the firm name and style of Nichols, Townsend & Co., defendants. This pleading contains twenty-six counts. In the first count the copartnership of the defendants is duly alleged. In this count the sale and delivery of goods, wares and merchandise to the value of \$217.85, by plaintiffs to defendants, at the latter's special instance and request, is charged. The remaining counts are all based upon claims against the defendants in favor of third parties, duly assigned to plaintiffs. Some of these assigned claims are for goods, wares and merchandise sold the defendants; others for work and labor performed at the special instance and request of the defendants; and still others are based upon certain due-bills alleged to have been given by defendants to various persons for labor performed, etc. The verification to the complaint was made by Dexter T. Sapp, one of the attorneys for plaintiffs in the cause, the affidavit showing that the facts alleged in the pleading were within his knowledge.

The defendant Townsend made default. In the an-

swer filed by the other defendants the allegation of partnership above set out is not controverted, but all other allegations of the complaint are denied. That portion of said answer which was in response to the fourth, seventh, eighth and ninth causes of action in the complaint was duly verified. As to the remaining counts in the said amended complaint, the answer was not verified. After this answer was filed, plaintiffs moved to strike out the portions of said answer which were not verified. After argument of counsel, the court sustained said motion, and struck out all that portion of said answer that has reference to the first, second, fifth, eighth and tenth to twenty-seventh causes of action in plaintiffs' complaint. The above order gave the defendants time in which to further answer said causes of action, if they so desired. The defendants having failed to answer in accordance with said order, default was afterwards taken against them upon all counts unanswered, and also upon the third cause of action, to which an unverified answer remained upon file. A jury being expressly waived by the parties, the cause was tried to the court. Upon such trial the court found the issues upon the fourth, seventh, eighth and ninth causes of action in favor of plaintiffs, and gave judgment accordingly. Upon the remaining counts in the complaint, the court rendered judgment in accordance with the prayer of the complaint, to which findings and judgment the defendants Ira Nichols and H. N. Nichols, having duly excepted, bring the case here upon appeal.

Messrs. GULLETT & BARNES and H. L. KARR, for appellants.

MR. JUSTICE HAYT delivered the opinion of the court.

The first six assignments of error relate to the striking out of certain portions of the defendants' answer for the reason that the same was unverified, and the entry of

judgment upon a certain cause of action by default. The action of the court was based upon the assumption that the complaint was properly verified, hence requiring a sworn answer thereto.

It is now contended that the verification to the complaint was defective, in that the reasons why it was made by the attorney, and not by one of the parties to the action, were not stated therein as required by the Civil Code. If such verification was defective in the particular mentioned, we think such defect was waived by the subsequent conduct of the defendants, as, instead of objecting to the form of the affidavit by motion or otherwise in the court below, they filed an answer, duly verified as to certain defenses, and not verified as to others. The verification was equally applicable to all portions of the complaint, and the defendants ought not to be permitted to treat it as sufficient for some counts in the complaint and insufficient as to others.

Under the circumstances, we think there was no error in requiring the defendants to verify each defense relied upon, and the order striking out the unverified portion of the answer was fully warranted. In such order ample time was given the defendants in which to plead to the causes of action remaining unanswered as the result of sustaining the motion to strike out, and we cannot doubt that properly verified answers would have been filed within the time if the defendants desired a trial upon the merits.

The record does not affirmatively show that the defense to plaintiffs' third cause of action was stricken out, although such defense was unverified, and was embraced in defendants' motion to strike out. The same being directed to all that portion of the pleading that was "subsequent to the jurat," and this defense appearing in the pleading after the jurat, it should have been stricken out in response to such motion. And the court appears to have treated it thereafter as though this had been done, by

entering judgment by default upon the cause of action to which such defense was interposed. The failure to have the order of the court show the ruling in reference to such defense perhaps resulted from a clerical error. Be this as it may, however, the action of the court thereafter, in treating such defense as insufficient to raise any issue, and entering judgment by default upon said cause of action, only accomplished the same result in a different way, and this, under the circumstances, in no way prejudiced the defendants; hence they are not in a position to complain thereat. *Drum v. Whiting*, 9 Cal. 422.

The remaining assignments of error relate to the admission of certain testimony, the findings of the court, and the judgment against the defendants. We think the rulings of the court in reference to the admissibility of the evidence objected to were correct. The evidence introduced on behalf of the plaintiffs is clearly sufficient to support the findings of the court in their favor. No evidence having been offered by the defendants, these findings cannot be disturbed. The judgment is accordingly affirmed.

Affirmed.

PATRICK V. McMANUS.

14	65
23	71

1. **POLICY OF CODE PLEADING — STRIKING OUT SHAM DEFENSES.**— It is the policy of the code to suppress falsehood and secure truth in pleadings, and as one means of securing such result authority for striking out sham answers and defenses is given.
2. **COUNTER-CLAIMS SUBJECT TO SAME RULE.**— A counter-claim, if sham, may be stricken out upon motion.
3. **ELEMENTS OF SHAM PLEAS.**— The essential element of a sham plea is its falsity.
4. **POWER TO STRIKE OUT NOT TO BE EXERCISED WHERE CONFLICT OF FACT INVOLVED.**— The power to strike out must, however, be exercised with caution. Under it the court cannot determine the truth or falsity of a plea upon conflicting evidence.

VOL. XIV — 5

Appeal from District Court of Arapahoe County.

ACTION upon a promissory note bearing date April 20, 1885. The note, which is for \$1,000 and interest, is set forth *in hæc verba* in the complaint. This pleading also contains the following allegation: "That afterwards, on the 3d day of August, 1886, at Denver, Colo., plaintiff requested defendant to pay said sum of \$1,000 and interest; that defendant did not nor has not since paid said sum of money or any part thereof. Prayer for judgment for \$1,000, together with interest from 20th of April, 1885, at eight per cent. per annum, and costs."

In his answer the appellant, after denying all allegations of the complaint, pleads payment, and for a further answer alleges: "That between the 20th day of April, A. D. 1885, and the date of filing said complaint, the defendant laid out and expended for the use and benefit of the said plaintiff, at her request, the sum of \$1,500 in cash."

The pleading closes with the following prayer for relief: "Wherefore defendant prays judgment against the plaintiff for the sum of \$500, together with interest thereon, from and after the date of the commencement of this suit; and the defendant prays that said promissory note be delivered up to the court for cancellation, and that he have his costs in this suit most unjustly expended."

After this answer was filed, plaintiff moved to strike the same from the files, and for judgment upon the pleadings, for the reason that "the said answer is a sham answer, as fully appears by the answer itself and by the affidavit hereto annexed and made a part of this motion." The defendant appeared, and resisted this motion, and filed a counter-affidavit. The affidavits submitted upon the hearing of plaintiff's motion were, in substance, as follows:

Affidavit of John F. Shaffroth: That he is one of plaintiff's attorneys; that on July 31, 1886, he sent notice

to defendant that his firm had for collection the note sued on, and requesting defendant to call and pay the same; that on or about August 3, 1886, defendant called; that defendant was shown said note, and requested to pay the same; that he admitted the note to be his, and that he owed the same, but could not pay the same then, but would do so if granted an extension of five or six months.

Affidavit of Camilla S. McManus: That she is plaintiff; that on April 20, 1885, at Pass Christian, Mississippi, defendant made the note sued on and delivered same to plaintiff for consideration of \$1,000; that defendant, nor any one for him, has ever paid said note or any part thereof, or the interest thereon; that defendant, neither between the 20th day of April, 1885, and date of bringing this suit, nor at any other time, laid out or expended for use or benefit of affiant, or at her request, the sum of \$1,500, or any other sum whatever; that said promissory note was, at the time of commencement of said action, due and unpaid, and still remains so.

Affidavit of defendant: That he is defendant; that he did promise to pay said note to Mr. Shaffroth; but affiant further says that he at that time claimed to have set-offs against said note more than sufficient to pay the same in full, and that if said note was sued on affiant would set up all such claims in defense; that whether or not such counter-claims constituted a good cause of action against plaintiff is a question of law and fact for the court and jury to pass upon; and that defendant makes such counter-claim, and insists upon the trial of the same, for the purpose of obtaining a judgment against said plaintiff; that at said interview affiant stated to Mr. Shaffroth that said note had been paid by affiant's wife.

At the hearing the court sustained said motion, and entered judgment for the plaintiff in accordance with the prayer of the complaint. The defendant, having duly excepted, brings the case here by appeal.

Mr. J. N. HUGHES, for appellant.

Mr. J. F. SHAFFROTH, for appellee.

MR. JUSTICE HAYT delivered the opinion of the court.

The answer filed in the cause was stricken out as a sham answer, and judgment thereupon entered for the plaintiff for the amount claimed in the complaint. Should such action of the court be sustained?

Whether the pleading was objectionable for other reasons than the one urged is not material. Appellee's motion was based solely upon the claim that the answer was a sham one. That part of the code relating to sham answers reads as follows: "Sham and irrelevant answers and defenses, and so much of any pleading as may be irrelevant, redundant, immaterial, or insufficient, may be stricken out upon motion, and upon such terms as the court, in its discretion, may impose." Sec. 61.

"Sham pleading," as defined by Chitty, is the pleading of a matter known by the party to be false, for the purpose of delay or other unworthy object. 1 Chit. Pl. 567. Bliss, in his work upon Code Pleadings, says that a "sham pleading" is one good in form and false in fact. Sec. 422. In Bouvier's Law Dictionary a "sham plea" is said to be one entered for the mere purpose of delay, concerning a matter which the pleader knows to be false. It will be seen, from these definitions, that the essential element of a sham plea is its falsity; and yet it is evident that not every false plea can be stricken out upon motion supported by affidavit, as this would be to substitute a trial to the court upon affidavits for a jury trial. An examination of decided cases shows that the courts have not adopted any uniform rule in reference to the nature of answers that may be stricken out upon motion as sham.

In *Brown v. Lewis*, 10 Ind. 232, it was decided that "if an answer is valid on its face, and no facts exist

peculiarly within the knowledge of the court showing it to be a sham defense, it should not be stricken out upon affidavit of its falsity." But in a subsequent case, it appearing that the defendant in response to interrogatories conceded his answer to the complaint to be false, it was held that it should be stricken out as sham. *Beeson v. McConnaha*, 12 Ind. 420. And this rule subsequently received the sanction of express statutory enactment. *Lowe v. Thompson*, 86 Ind. 503.

In California a plea of payment to a suit upon a promissory note was stricken out by the trial court upon affidavits showing the falsity of such plea, and the *mala fides* of the defendants in pleading it, and such action was sustained upon appeal. *Gostorfs v. Taafe*, 18 Cal. 386. In *People v. McCumber*, 18 N. Y. 315, a defense consisting of denials of knowledge or information sufficient to form a belief as to several matters, and a qualified denial in direct terms of another allegation of the complaint, was stricken out as sham, the court holding that a defense otherwise good may, if false, be stricken out as sham, although duly verified, and this may now be considered as the general practice in New York. See *Corbett v. Eno*, 13 Abb. Pr. 65. So, also, in Minnesota it has been repeatedly held that a sham answer, although verified, may be stricken out upon proof of its falsity. *Hayward v. Grant*, 13 Minn. 165 (Gil. 154); *Barker v. Foster*, 29 Minn. 166; *Lumber Co. v. Richardson*, 31 Minn. 267.

In *Torrence v. Strong*, 4 Or. 39, it was decided that an answer good in form, and containing facts sufficient to constitute a defense, cannot be gotten rid of by demurrer, but that it may be stricken out as false. *Tharin v. Seabrook*, 6 S. C. 113, is authority for saying that objection to sham defenses ordinarily presents a question of fact to be determined on affidavits. If an answer is manifestly false, it may be stricken out as sham, although this power should be sparingly used, and only in cases free from doubt. It is the policy of the code "to

suppress falsehood and secure truth in the pleadings," and, as one means of securing such result, authority for striking out sham answers and defenses is given. In counties where the dockets are overburdened with causes, the temptation to interpose sham answers, for the purpose of delay only, is great; and when it clearly appears that such answers are false in fact, according to the great weight of authority and reason, the court may, upon motion, strike them out. This power must, however, be exercised with extreme caution; otherwise a trial to the court upon affidavits might be substituted for a jury trial. It cannot rightfully be exercised for the purpose of determining the truth or falsity of a defense upon conflicting evidence. The inquiry ought not to be extended in such cases further than may be necessary for the court to determine that such a conflict in fact exists; but where, as in this case, the material averments of the complaint are directly supported by affidavits positive in form, we think the defendant has no right to complain of an order requiring him to support his unverified answer by an affidavit of merits, and, upon failure to comply therewith, to have his pleading stricken from the files. And it would make no difference if a portion of this answer be treated as a counter-claim, as the code provision is directed not only against sham and irrelevant defenses, but to answers as well, and the counter-claim must be considered as a part of the answer. Any other construction would permit defendants to evade the consequences of the act, and delay judgment, by interposing sham counter-claims instead of sham defenses.

It requires no argument to show that the affidavit of defendant in support of his answer in this case does not amount to an affidavit of merits. It does not deny the execution of the note. On the contrary, the due execution thereof is admitted under the pleadings, a copy of the note appearing in the complaint, and the answer

thereto not having been verified. The affidavit does not state that the note has been paid. It merely alleges that on a prior occasion Patrick claimed that his wife had paid it. Neither does it contain an averment that plaintiff has a set-off of any kind or nature whatsoever, affiant contenting himself with the statement that he at one time claimed to have set-offs more than sufficient to pay the note in full, and that if sued he would set the same up in defense. This so-called affidavit of merits is clearly insufficient; it fails to state any fact showing, or tending to show, the truth of the answer. It does not even state that the answer is interposed in good faith, or that his attorney, after being informed of the facts, has advised him that he has a meritorious defense to the action. The affidavit is so entirely lacking in the essential requisites of such a paper that the court below, in deference to well-established rules, was bound to disregard it in the determination of plaintiff's motion. *Wedderspoon v. Rogers*, 32 Cal. 569; *Kaufman v. Mining Co.* 105 Pa. St. 541; *McCracken v. Congregation*, 111 Pa. St. 106; *King v. Stewart*, 48 Iowa, 334.

The judgment of the court below is accordingly affirmed.

Affirmed.

HUER V. CITY OF CENTRAL.

1. CONSTITUTIONAL LAW — INCORPORATION OF CITY BY SPECIAL CHARTER BEFORE THE CONSTITUTION.— Where, before the adoption of the state constitution, a city was incorporated under a special charter, and no abandonment of this charter, and re-incorporation under the general laws relating to towns and cities, has taken place, the original charter, and amendments thereto, are not unconstitutional on the ground of special or local legislation; and, unless inconsistent with the constitution, they may stand.
2. APPEAL FROM POLICE MAGISTRATE TO DISTRICT COURT.— Originally the charter of defendant provided for the election of "one justice of the peace to be denominated 'police judge,' for the city of Cen-

tral." By subsequent amendment the language was so changed as simply to require the election of "one police judge." The city charter further contained the following provision: "Appeals shall be allowed from decisions in all cases arising under the provisions of this act, or any ordinance passed in pursuance thereto, to the district court; and every such appeal shall be granted in the same manner, and with like effect, as appeals are taken from and granted by justices of the peace under the laws of this territory." Afterwards the course of appeal from justices of the peace to the district court was changed to the county court. *Held*, notwithstanding, that an appeal would lie from the police judge to the district court.

8. **ERROR TO DISMISS CAUSE FOR WANT OF JURISDICTION WHEN PENDING ON APPEAL.**—On such an appeal, irrespective of the question of jurisdiction, the district court was not authorized to dismiss the cause.

Appeal from District Court of Gilpin County.

CLEMENT E. HUER was tried and convicted before the police magistrate under an ordinance of the city of Central. He appealed from the judgment pronounced, to the district court. In the latter court, on motion, his appeal was dismissed for want of jurisdiction, and judgment was rendered against him for costs. To reverse this judgment the present appeal was taken, under the act of 1885, regulating practice in this court.

Mr. J. MCD. LIVESAY, for appellant.

E. W. HURLBUT, for appellee.

CHIEF JUSTICE HELM delivered the opinion of the court.

Prior to the adoption of the constitution, Central City was incorporated under a special charter. No abandonment of this charter, and re-incorporation under the general law relating to towns and cities, has since taken place. Therefore provisions of the original charter, and legitimate amendments thereto, are not unconstitutional upon the ground of special or local legislation; and, unless inconsistent with the constitution, they may stand. *People v. Londoner*, and citations, 13 Colo. 303.

Originally, the charter in question provided for the election of "one justice of the peace, to be denominated 'police judge,' for the city of Central." But by subsequent amendment the language was so changed as simply to require the election of "one police judge." Sess. Laws 1866, p. 94. While the office has since been made appointive, instead of elective, the requirement that the incumbent be a justice of the peace has not been restored.

This police judge or "magistrate," as he is termed in some parts of the charter, is now appointed by the council. By statute, he is given jurisdiction over actions for the violation of city ordinances. By ordinance, such jurisdiction is made exclusive, except in case of absence or disability. If it were a fact that the police judge is also clothed with the powers of a justice of the peace, the present inquiry would not be affected thereby. In the case at bar he was not acting, or attempting to act, as a justice of the peace. He proceeded as police judge or magistrate, exclusively, and discharged the duties peculiar to that office.

Appeals do not now lie, under the general law, from justices of the peace to the district court. The judgment of the court below was predicated upon the proposition that, for this reason, no appeal would lie from the police judge of Central to the district court. The special charter of Central City contains the following provision: "Appeals shall be allowed from decisions in all cases arising under the provisions of this act, or any ordinance passed in pursuance thereto, to the district court; and every such appeal shall be granted in the same manner, and with like effect, as appeals are taken from and granted by justices of the peace under the laws of this territory."

The foregoing statute, which was adopted in 1864, contains, in substance, two affirmative declarations: *First*, that appeals from decisions of the police judge, in cases

relating to the violation of city ordinances, shall lie to the district court; and, *secondly*, that such appeals are to be granted and prosecuted in the same manner, and with like effect, as are appeals from judgments of justices of the peace. The two clauses of this provision are therefore separate, and in a certain sense independent of each other. The first specifies the forum to which the appeals in question shall be taken. The second points out the manner of prosecuting such appeals. It is true that when the statute first became a law the right of appeal from justices of the peace to the district court also existed. It is likewise true that this right has been taken away, and that for the last twelve years appeals from justices of the peace have been returnable exclusively to the county court. But there is nothing in the constitution requiring that appeals from police magistrates, in actions under ordinances, be taken to the same tribunal as those from justices of the peace acting within their ordinary jurisdiction. Nor has the statute under consideration been changed or repealed by other legislative enactment. In view of the plain statutory declaration on the subject, and of the fact, above mentioned, that the statute is not void because local in its operation, we are of opinion that the appeal in question was erroneously dismissed.

Substituting the word "state" for the word "territory" in the provision, as we are authorized to do, the foregoing construction involves no inconsistency or difficulty. The appeal lies to the district court; but it is to be granted in the same manner, and prosecuted with the same effect, as appeals, under the present general laws, from justices of the peace to the county court.

We have not seen fit to notice the fact that, according to the record recital, the district court dismissed the *cause itself*, instead of the appeal from the police magistrate. In any view of the case, this ruling would, at the stage of the proceeding when taken, be erroneous. If the court

had no jurisdiction of the appeal, it could not dismiss the cause; while, if the court did have jurisdiction of the appeal, it had no authority to summarily dispose of the *cause* in this manner. The judgment is reversed and the cause remanded.

Reversed.

SMITH V. BRUNK ET AL.

1. PROMISSORY NOTES—LEGAL EFFECT OF THEIR ASSIGNMENT.—The assignment of a promissory note vests in the assignee both the note and the security originally given in connection therewith.
2. REFORMING INSTRUMENTS AT THE SUIT OF AN INDORSEE TO EXPRESS THE MEANING OF THE ORIGINAL PARTIES THERETO.—At the time of the execution of a negotiable note the maker also executed a title-bond, agreeing to convey to the payee an undivided one-half interest in certain mining claims, which were carefully described. It was also agreed that the payee should have a lien on these premises for the payment of the note, and the maker inserted a special condition, providing that "this bond shall be and remain a special lien upon, and for the payment" of, the note; but by mistake or fraud he omitted the words "the said property above described" after the words "lien upon." *Held*, that as between an indorsee of the note and the maker, and as against subsequent purchasers or incumbrancers of the premises, with full notice of the payee's and indorsee's rights, the bond would be reformed so as to express the meaning of the parties thereto.

Appeal from District Court of Summit County.

Mr. M. B. CARPENTER, for appellant.

Messrs. BAILEY & WILKIN, for appellees.

CHIEF JUSTICE HELM delivered the opinion of the court.

The complaint in this case averred, among other things, that on the 12th day of March, 1884, Brunk made and executed to one Gorton his promissory note for \$2,500, payable in two years, with interest at the rate of eight per cent. per annum; that at the same time Brunk

also executed to Gorton a title-bond, agreeing to convey, upon payment of \$12,000, an undivided one-half interest in certain mining claims, which were carefully described; that as a part of the same transaction a special agreement was entered into between Brunk and Gorton, to the effect that the latter should have a mortgage lien upon said premises for the payment of the note mentioned, and that the title-bond should contain a paragraph reducing the lien contract to writing; that Brunk drew the alleged bond and mortgage, inserting therein the following clause: "Special Condition. It is agreed by the said George W. Brunk that this bond shall be and remain a special lien upon, and for the payment of, a certain promissory note executed on the day of the date hereof by the said George W. Brunk, payable to the order of S. S. Gorton at the First National Bank of Denver, Colo., two years after the date hereof, for the principal sum of \$2,500, with interest at eight per cent. per annum."

The complaint further alleged "that, in writing the said special condition above mentioned, the said defendant Brunk left out, by mistake, inadvertence or fraud, the words, 'the said property above described,' after the words, 'a special lien upon;' that such mistake was not discovered by the said Gorton or defendant Brunk until after the recording of the said title-bond, which was recorded on the 17th day of March, 1884, in Book 51 of Deeds, on page 277, of the records of Summit county, Colo.; that it was the intention of the defendant Brunk to give to the said Gorton a lien upon the said property above described, for the payment of the said note of \$2,500, and a good security upon such mining property for the payment of the said note, but that, through mistake, inadvertence or fraud, the bond was drawn, executed, acknowledged and delivered with the said words, 'the property above described,' left out;" that the alleged claim or interest of the remaining defendants in the

premises was procured subsequent to the recording aforesaid; that the promissory note was, before maturity, for valuable consideration, duly assigned to plaintiff; and that defendant Brunk was wholly insolvent, and unable to pay the note or satisfy any judgment obtained against him thereon.

The prayer was that the instrument be reformed so as to express the full intention and meaning of the parties thereto; also that, unless the note and interest be paid, a decree of foreclosure be entered in accordance with law.

To this complaint a demurrer was filed and sustained. Judgment being entered upon these pleadings in favor of defendants, the present appeal was taken.

The purpose of the parties in executing the instrument described by the complaint is too clear to be misunderstood. A cursory examination of this instrument shows clearly that, while intended to be a title-bond, it was also designed to operate as a mortgage upon the premises mentioned, securing payment of the \$2,500 note. The so-called "special condition" is not worded in accurate legal terms; it was written by Brunk, who was not a lawyer; but it declares that the bond "shall be and remain a special lien upon, and for the payment of, a certain promissory note," etc. Lien upon what? No one could read the language employed without being impressed with the certainty that some words were omitted, but no real doubt could exist as to what the omission related. The natural and reasonable inference, from the entire context of the writing, is that the intention of the parties was to create a valid incumbrance upon the real estate previously therein described. It is hardly necessary to remind counsel that we are not here dealing with a case where no property is described in any part of the writing.

By the assignment of the note to Smith, the security, such as it was, passed also to him. Were Brunk the only

defendant, we would have no hesitation in saying that, upon the averments of the complaint, properly supported by proofs, a court of equity might reform the instrument, and carry out the original intent of the parties thereto. The alleged interest or claim of the remaining defendants did not, under the circumstances, destroy the legal sufficiency of the pleading. The complaint avers that such claim or interest, whatever it might prove to be, was "obtained with full notice and knowledge of the said Gorton's and plaintiff's rights in the premises." This averment might have been couched in more technical language, but its meaning is reasonably plain. Whether appellant relies upon actual notice or knowledge, or upon constructive notice through the prior recording of the instrument, we are not advised; and whether or not the record of the instrument, containing, as it did, the special condition mentioned, and also a perfect description of the property bonded, was sufficient to put them upon inquiry, and thus charge them with notice, we need not now determine. Accepting, as we must, the material allegations of the complaint as true, it does not at present appear that Brunk's co-defendants were in any better position than Brunk himself.

We do not discuss the question of misjoinder of parties. If plaintiff is entitled to a mortgage lien upon the premises, subsequent purchasers or incumbrancers are certainly *proper* parties to his action for reformation and foreclosure.

The court erred in sustaining the demurrer. The judgment is accordingly reversed and the cause remanded.

Reversed.

RICO REDUCTION & MINING CO. V. MUSGRAVE ET AL.

1. CONSTRUCTION OF MINER'S LIEN STATUTE.—The legislation of this state upon the subject of mechanics' and miners' liens should receive a liberal construction.
2. SAME — ADMISSIBILITY OF STATEMENT IN EVIDENCE.—A statement upon which a miner's lien is sought to be based, which clearly expresses an intention to hold and claim a lien, and contains a description of the property complete on its face, and shows the sum total in dollars and cents which the claimant's work amounts to, and states that the same is due, and that no portion of it has been paid, is admissible in evidence against an objection challenging its sufficiency.
3. WHEN STATEMENT FOR LIEN INCLUDES SEVERAL MINING CLAIMS, HOW NECESSARY FACTS MAY BE ESTABLISHED.—A statement filed in the recorder's office against several mining claims need not state that said claims are owned, claimed or worked by the same person or persons, so as to be deemed one mine, for the purposes of the miner's lien statute; it is sufficient if such matters are established by proper averment and proof, or by proof alone, when the defect in the pleadings is waived by answering over.
4. A CONTRACT WITH OWNER OR AGENT OF PROPERTY ESSENTIAL TO A LIEN — BURDEN OF PROOF.—To entitle a party to such lien there must be a contract, express or implied, with the owner of the property on which the lien is claimed. The burden of proving such contract rests on the party asserting it, and he must ascertain for himself whether the person with whom he contracts is the owner, or has an interest in the land on which he expects to claim a lien. It is sufficient if the contract be with an authorized agent of the owner.
5. CONSENT OF CO-TENANTS NECESSARY TO IMPROVEMENT OF THE JOINT PROPERTY AT EXPENSE OF ALL.—The law does not invest one tenant in common with authority to improve or develop real property at the expense of his co-tenants, without their authority or consent.
6. PRACTICE IN SUPREME COURT IN CASES IN WHICH ERROR OCCURRED IN THE TRIAL BELOW.—It is not the usual practice of this court to substitute its own findings in the place of the findings of the trial court upon matters of fact based upon conflicting evidence given orally in open court; but, where the conclusions of law are erroneous, the general rule is to reverse the judgment, and remand the cause for a new trial.
7. WHEN EVIDENCE TAKEN AT FORMER TRIAL MAY BE USED ON RETRIAL.—On a retrial, where there has been a loss of witnesses by death or removal from the jurisdiction of the court, evidence taken at the former trial and preserved by bill of exceptions, or otherwise correctly preserved, may be resorted to.

14	79
90	463

14	79
11a	92

14	79
16a	491

14	79
33	245

Appeal from District Court of Dolores County.

Messrs. RUSSELL & McCLOSKEY, for appellant.

Messrs. JULIUS THOMPSON and PENCE & PENCE, for appellees.

MR. JUSTICE ELLIOTT delivered the opinion of the court.

The appellant, the Rico Reduction & Mining Company, was defendant below in proceedings instituted to enforce sundry liens upon certain mining property on account of work and labor performed thereon by appellees, who recovered judgment, sustaining their respective claims as liens against the property of appellant. The statements filed in the office of the recorder, upon which the several liens of appellees were based, respectively, were as follows, differing as to name of claimant, dates and amounts, but not as to substantial requisites:

"The Rico Reduction & Mining Company, Harry Cahn and L. Silverman: You are hereby notified that I claim and hold a lien upon the Little Suse, Little Wonder and Russian Bear lodes and mining claims, situated adjoining each other on the north side of, and about one-half mile from, West Dolores river, in Dolores county, state of Colorado; location certificate of the first of said claims being recorded in book 21, page 97; location certificate of second of said lodes being recorded in book 21, page 97; and location certificate of third of said claims being recorded in book 21, page 79, of records of Dolores county, to which reference in each case is here made for a more particular description, and that such lien is claimed for and on account of one hundred and twenty-one days' work performed by me, as a miner upon said properties, between the 7th day of January, 1884, and the 31st day of May, 1884, for which labor you agreed to pay me at the rate of \$2.50 per day, amounting to the sum total of \$302.50, which you agreed to pay me as soon as said work was done, but no portion of which has as

yet been paid." Objections to the sufficiency of these statements at the trial were overruled by the court, and these rulings are assigned for error.

It is contended that the statements are defective in the description of the property, and in the abstract of indebtedness. In a recent and well-considered opinion by this court, *Cannon v. Williams*, ante, p. 21, it is declared that our legislation upon the subject of mechanics' and miners' liens should receive a liberal construction. The same doctrine was announced in *Barnard v. McKenzie*, 4 Colo. 251, in relation to the law of 1872. Section 27 of the act of 1883 (Gen. St. ch. 65), referring to the statement by which the lien may be claimed, provides that "any informality in any such statement that shall not tend to mislead shall not affect the validity thereof." Viewing this provision of the statute in the light of the opinions above cited, it is apparent that neither of the foregoing objections is well taken. On the face of the several statements, the description of the property appears to be complete. The "notice of intention to claim and hold a lien" is clear. The "whole amount of debt" is shown in the "sum total" of dollars and cents which the claimant's work amounted to. The "whole amount of credit" is shown to be *nothing* by the positive assertion that "no portion" of the amount earned "has yet been paid." It is plainly asserted that the amount earned was *agreed* to be paid "as soon as said work was done;" hence, it is evident that the "balance due" is exactly the same as the "whole amount of debt," and the sum need not be repeated. Thus the requirements of the statute are substantially complied with.

The further objection is urged that the statements do not show how many days the claimants worked on each lode, nor the amount due therefor, nor that said lodes and mining claims were owned, claimed or worked by the same person or persons, so as to be deemed one mine for the purposes of the mechanics' and miners' lien stat-

ute. In our opinion, these matters need not be set forth in the statement more fully than they are. It is sufficient if they are established by proper averment and proof, or by proof alone, when the defect in the pleading is waived by answering over, as in this case.

It is further assigned for error that the judgment is contrary to the findings of the court, and the law applicable thereto. An intelligent consideration of this question necessitates a further statement of the matters at issue in this litigation, and a better understanding of the interest of the parties in the property in controversy. These proceedings were originally commenced against the Rico Reduction and Mining Company, a corporation, Harry Cahn and L. Silverman, as joint defendants; it being alleged that said company was the owner of an undivided half interest in all of said property. Each plaintiff based his claim for a lien upon work performed under an alleged verbal agreement with the Rico Company, entered into through one Phil Crout, as the agent of the company, duly authorized to employ laborers on the property in its behalf. The Rico Company, by its answer, admitted its ownership of the undivided half of the property, but denied the making of any agreement for the employment of plaintiffs, or either of them, through the agency of Crout, or otherwise. It was further alleged in the answer, on information and belief, that Crout was the owner of the other half interest in said mining property, and that whatever work may have been done by plaintiffs on said property, as alleged in the complaint, was so done for and on behalf of said Crout, and for and on behalf of his own interest in the property, and without the knowledge or consent of the Rico Company. The proceedings as against Cahn and Silverman were voluntarily dismissed by plaintiffs before the trial in the district court, and upon the trial the findings of the court were, *inter alia*, in substance as follows: That the defendant the Rico Company was the legal and

equitable owner of an undivided one-half interest, and that Phil Crout and Joseph Hoskins were the equitable owners of the other undivided half interest in said mining lodes; that no contract was entered into between the defendant company and Phil Crout, authorizing said Crout to act as the agent of said company, and to bind said company for the contracts made by said Crout with plaintiffs, and that said company did not ratify the contracts of said Crout with said plaintiffs; that defendant company had actual knowledge of the working and development of the said lodes by the plaintiffs, and received one-half the benefit and advantage of the labor bestowed by plaintiffs on the same.

To entitle a party to a mechanic's or miner's lien the work must be done or the material furnished by contract, express or implied, *with the owner* of the property on which the lien is claimed. The burden of proving such contract rests on the party asserting it, and he must ascertain for himself whether the person with whom he contracts is the owner or has an interest in the land on which he expects to claim a lien for the improvement contributed to by his work or material. It is sufficient if the contract be with an authorized agent of the owner; and, if the contract be with one of several co-tenants, undertaking for himself alone, the lien may be enforced for the whole value of the improvement against the moiety of such contracting party. *Mellor v. Valentine*, 3 Colo. 255; *Williams v. Canal Co.* 13 Colo. 469.

In Phillips on Mechanics' Liens (section 77) it is said: "No man has a right to improve the property of another against his consent, and charge him with the expenses. Perhaps a joint owner may repair and preserve property at the expense of all the owners, and without their consent, especially if such consent is unreasonably withheld. But this is all that he can do. He cannot improve the property. * * * One joint tenant, however, may create a lien in favor of a mechanic on his own interest in

land. So, although the contract is to be made with the 'owner,' yet, if but one of several persons who purchase materials for building owns the land, the lien will be good against his interest." Freem. Co-ten. §§ 261, 262; *Mumford v. Brown*, 6 Cow. 475.

From the findings of the court it appears that Crout was one of several owners of the property upon which plaintiffs were employed, and against which they seek to establish their several liens. They claim to have made their contracts of employment with the company by verbal agreement, through Crout, as the company's agent. The court finds that he had no authority as such agent, and that the company did not ratify his contracts with plaintiffs. It is true the court finds that the company had actual knowledge of the working and development of the property by plaintiffs, and that it received one-half the benefit of their labor; but the findings do not state when the company acquired such knowledge, nor do they indicate that at any time the company had knowledge that Crout had assumed to employ plaintiffs for or in its behalf. As we have seen, the law does not invest one tenant in common with authority to improve or develop real property at the expense of his co-tenants, without their authority or consent. Hence, it was error for the court, upon such findings, to render judgment sustaining plaintiffs' liens against the interest of the Rico Company in the mining property.

It is contended by counsel for appellees that the evidence is sufficient to warrant this court in finding that Crout did have authority from the Rico Company to employ plaintiffs in its behalf for the development of the mine, and that they were so employed. If the trial court had made such findings as a basis for its decree, perhaps a judgment of affirmance might be rendered. But we cannot disregard the fact that the findings are otherwise, and that they are based upon conflicting evidence, most of which was given orally in open court. Under such

circumstances, the usual practice of this court, where the conclusions of law are erroneous, is to reverse the judgment and remand the cause for a new trial; and it is accordingly so ordered.

Reversed.

ON PETITION FOR REHEARING.

PER CURIAM. The only matter suggested in the application for a rehearing is that we shall direct a money judgment in favor of appellees, on the ground that on a retrial of this case there may be a failure of justice, occasioned by the lapse of time and the loss of witnesses by death or removal from the jurisdiction of the court. In case of such difficulty, it is well settled that the evidence taken at the former trial, and preserved by bill of exceptions, or otherwise, may be resorted to, in connection with any additional evidence; and thus a trial *de novo* upon the whole case, with new findings of fact, may be had. This may be quite advantageous to appellees, for the findings of fact on the former trial would not sustain a personal judgment against the Rico Company any better than they sustain the lien. With this explanation, the rehearing asked for will be denied.

Rehearing denied.

COLORADO MIDLAND RAILWAY CO. v. BOWLES.

1. EMINENT DOMAIN — PROCEEDINGS AT SUIT OF A RAILWAY COMPANY FOR RIGHT OF WAY PENDING THE SUSPENSION OF A PRE-EMPTION CLAIM — DISCRETION OF COURT.— When the entry of a pre-emption claimant has been suspended, and proceedings to condemn a right of way through the land for a railroad have been instituted, the claim of the railway company for a continuance of the latter proceedings pending the determination of the suspended entry by the department of the general land-office appeals strongly to the discretion of the court.

2. PRACTICE — SURPRISE, WHEN A GROUND FOR NEW TRIAL. — When a party, in the midst of a trial, is taken unawares, and, without fault of his own, is placed in a situation greatly injurious to his interests, as by the unexpected admission of evidence upon an issue which, by reason of an order of court made previous to the commencement of the trial, he was not prepared to meet, a case of surprise is presented which, if not otherwise remedied, may be made a ground of motion for a new trial.

Appeal from District Court of Pitkin County.

H. T. ROGERS, A. E. PATTISON and WILSON & STIMSON,
for appellant.

MR. JUSTICE ELLIOTT delivered the opinion of the court.

The Colorado Midland Railway Company, appellant, was the petitioner below in proceedings to condemn certain land as a right of way for the construction of its railroad. Appellee Bowles, defendant below, had entered the land under the pre-emption laws of the United States, had paid the government price therefor, and had received from the United States land-office the certificate of purchase in the usual form. It was alleged in the original petition, presented August 9, 1886, that Bowles claimed and appeared to be the owner of the land. On February 15, 1887, an amended petition was filed in which it was alleged, *inter alia*, that the pre-emption entry of Bowles has been and now is suspended and held for cancellation by order of the honorable commissioner of the general land-office of the United States, and that petitioner has in all respects complied with the act of congress, approved March 3, 1875, granting to railroads the right of way through the public lands of the United States.

The cause being reached for trial, petitioner moved for a continuance on affidavits showing that the entry of Bowles had been suspended on account of fraud and perjury committed by him in securing the certificate of purchase from the land-office. The court first held the grounds of the motion sufficient, but finally overruled

the same on terms limiting defendant in respect to the admission of evidence, and the measure of damages.

On the trial the defendant was permitted to introduce evidence tending to show the validity of his entry, also to show the value of the land actually taken, and damages to the residue. Petitioner's counsel objected to this testimony on the ground that defendant's pre-emption entry was suspended, and claimed surprise because the court, in denying the motion for continuance, had ruled that "defendant would be confined to proof of damages to his actual possession only; that is, damages to his surface improvements." Afterwards, during the trial, the court defined its rulings to be that "the certificate of entry or the receiver's receipt should not be offered as conclusive evidence of the entry." And so, against the objection of petitioner, the case was tried, and submitted to the jury, upon the theory that defendant might recover full compensation and damages for the land taken and damaged upon showing compliance with the pre-emption laws of the United States, as in case of making final proof before the United States land-office; petitioner being allowed to controvert the validity of defendant's entry; the jury to determine the controversy.

The jury found the value of the land taken to be \$411.79, and the damages to the residue to be \$721.66. It is evident from this verdict that the jury sustained defendant's title to the land as though there had been no suspension of his entry, and allowed him full compensation and damages therefor. Petitioner appeals, and assigns for error, among other things, the refusal to grant a continuance, its surprise at the admission of evidence to sustain defendant's entry, and to show the value of the land, and also the denial of the motion for a new trial.

Defendant's title to the land depended upon the validity of his pre-emption entry. If his entry should be canceled, and the lands should become a part of the public

domain, petitioner would be entitled to a right of way through the same for its railroad, upon complying with the act of congress of March 3, 1875. Hence, petitioner's claim for a continuance pending the investigation and determination of such entry by the department of the general land-office, whether a matter of absolute right or not, was based upon grounds appealing most strongly to the discretion of the court. So the trial court must have considered when the motion for a continuance was held sufficient in the first instance, and was overruled on terms. The terms, as shown by the abstract of the record, are somewhat ambiguous; but we think a reasonable construction of them is that defendant would be allowed to recover compensation and damages to his possessory interest merely,—that is, to the surface improvements on said land. The court may not have intended to prescribe such terms, and defendant's counsel may not have so understood them; but petitioner's counsel were certainly justifiable in so construing the language of the order. Defendant made no objection to the terms on which the continuance was refused, while petitioner objected and excepted to the refusal on any terms. The object of the desired continuance was to have defendant's title settled by the ultimate authority of the United States, before attempting to assess the compensation and damages. This object was defeated by allowing the jury to try the question respecting the validity of defendant's entry, and to give defendant full compensation and damages for the land itself in case they should find in his favor upon that issue.

The trial was entered upon immediately after overruling the motion for a continuance. As petitioner's counsel understood the terms upon which the motion was overruled, they were not advised that the facts respecting the validity of defendant's entry and title were to be litigated until the trial was actually entered upon. It is an elementary principle of our jurisprudence that

parties are entitled to be advised concerning the matters to be litigated a sufficient length of time in advance of the trial to be prepared to meet them. When the issues are formed, as is usual in courts of record, by the pleadings of the parties, they must ordinarily advise themselves, at their peril. So, too, where amendments to pleadings are properly allowed during the trial, a continuance or a new trial may not be a matter of right, without showing special injury resulting therefrom. But when, as in this case, the court restricts the issues to be tried, or limits the evidence to be received in a material matter, as a condition for refusing a motion for continuance otherwise well grounded, the terms of the condition should be substantially free from ambiguity, and should not be materially changed, to the prejudice of either party, during the progress of the trial.

This case presents an instance, somewhat rare in actual practice, of genuine surprise. Petitioner's counsel were not only taken unawares by the unexpected admission of evidence to sustain defendant's entry, and to show the value of the land itself, whereby the damages were greatly augmented, but they were placed in a situation, without any fault of their own, greatly injurious to their interests, in which they were not prepared, and could not be expected to be prepared, to meet such an issue. There was doubtless a misunderstanding between court and counsel as to the limitation placed upon defendant as a condition for refusing the motion for continuance. A surprise of this nature, if not otherwise remedied, may be made the ground of motion for a new trial. Bur. Law Dict.; *Knoth v. Barclay*, 8 Colo. 300; *Mulhall v. Keenan*, 18 Wall. 342.

As already intimated, the court, in its discretion under the circumstances, might well have granted a continuance; but, as the question is not likely to arise again, we need not determine whether the refusal to continue would have been substantial error if the terms as understood by

appellant had been observed. If, when the case is reached for trial again, the title is still in abeyance by the suspension of the entry, the district court should grant a further continuance, if desired by either party.

The case having been presented by appellant *ex parte* in this court, we do not deem it expedient to consider and determine the remaining assignments of error. The judgment of the district court is reversed and the cause remanded.

Reversed.

GREAT WEST MIN. CO. v. WOODMAS OF ALSTON MIN. CO.
ET AL.

1. PRACTICE IN COURTS OF EQUITY—RIGHTS FORFEITED BY LACHES OF PARTIES.—Courts of equity will only grant relief in case the application therefor is made without unreasonable delay. The strongest equity may be forfeited by laches, or abandoned by acquiescence.
2. FLUCTUATING CHARACTER OF PROPERTY TO BE CONSIDERED IN DETERMINING LACHES—MINING CLAIMS.—Where the subject-matter of a controversy is the right to unpatented mining property, the uncertain and fluctuating character of the property will be considered in determining the question of laches.
3. STATUTE OF LIMITATIONS SUPERIOR TO COURTS OF EQUITY.—The statute of limitations fixes a limit beyond which the courts cannot extend the time, but within this limit the peculiar doctrine of courts of equity will prevail.
4. VOID AND VOIDABLE JUDGMENTS.—As a rule, a judgment of a court of general jurisdiction is void in no case except when it appears from the record itself that the court, in pronouncing it, acted without jurisdiction.

Appeal from District Court of Arapahoe County.

Messrs. L. S. DIXON and H. B. JOHNSON, for appellant.

Mr. HUGH BUTLER, for appellees.

MR. JUSTICE HAYT delivered the opinion of the court.

The facts in this case, as they appeared previous to the last trial, are sufficiently set forth in the former opinions

14	90
15	191
16	94
14	90
2a	140
14	90
19	554
14	90
21	815
21	818
22	427
5a	402
14	90
25	352
12a	114
12a	116
12a	175
14	90
27	549
14	90
28	417
14	90
31	188
14	90
33	507
14	90
35	53

filed herein, and will not be again repeated. See 12 Colo. 46. The judgment of the district court of El Paso county in favor of appellees was then reversed, and the case remanded to that court, leaving counsel and the court below to pursue such course in relation to additional parties and further proceedings as they should be advised. Thereafter, by consent of parties, a change of venue was taken to the district court of Arapahoe county, and a new trial had. Upon this trial a large amount of additional evidence was introduced, upon which evidence, considered with that previously taken, the court below found the issues for the defendants, and dismissed the bill.

To review this action of the court the case is brought here by appeal. In the district court the judge presiding at the trial, Hon. O. B. LIDDELL, filed a written opinion, with a copy of which we have been favored by counsel. In it the learned judge reviews the case at length, in connection with the authorities, and arrives at the conclusion that the appellant had been guilty of such unreasonable delay in asserting its rights that it ought not to be heard now.

An examination of the new evidence introduced discloses that it was largely directed to the question of laches. Upon the case as made upon the former appeal, this court was of the opinion that laches sufficient to defeat a recovery did not appear. Mr. Justice GERRY, delivering the opinion of the court, then said, in reference to Purmort, and the service of process upon him, that he "concealed, or neglected to inform the company of the fact of such service."

And again, upon rehearing, it was said: "The appellant was not informed of the false return, or of the unauthorized appearances of Gwynn, in time to proceed by motion to correct the same in the court where the attachment suits were pending, and had no notice of the sale of its real property until the time for redemption had ex-

pired, but, as soon as it did obtain information of the fraud perpetrated upon it, it was diligent in employing counsel and commencing this suit; and, as this suit was brought within less than three years from the time of the perpetration of the fraud complained of, and within less than eighteen months from the time of the execution of the sheriff's deeds, and promptly upon the discovery of the fraud that had been practiced upon it, we think the appellant was chargeable with no such laches as should bar it from maintaining this action."

The additional evidence occupies over two hundred pages of the type-written transcript, and was deemed sufficient by the trial judge, after giving due weight to the evidence taken upon the first trial, and also to the former opinions of this court, to radically change the result then announced. With this new evidence the case is now before the court in a different aspect from that in which it appeared upon the first appeal. It is now shown that A. W. Kellogg was not only general agent of the appellant company, but that he had the entire management of the corporate business. The then secretary of the company, Mr. A. S. Whitaker, who has at all times been active in prosecuting this action, swears in reference to the Great West enterprise: "It was a pet scheme of Mr. Kellogg, and he attended to everything." Again he refers to Kellogg as "having the supreme management."

The nature and scope of Mr. Kellogg's authority in the premises becomes important, in view of the fact that he, in the interest of the Great West Company, arranged for the institution of the Perkins suit in advance of Moynahan, who was threatening suit, in order that the working of the mine should not be interfered with. It appears that, in accordance with an arrangement previously entered into between Kellogg and the workmen at the mine, upon ascertaining from Moynahan, at Denver, that he was about to institute suit, Kellogg, by telegraph,

directed the Perkins suit to be brought. These telegrams, two in number, were directed to Frank D. Howe, who describes himself as Kellogg's "closest friend." The originals were not produced upon the trial; but, their loss having been shown, Mr. Howe testified as to their contents as follows: "The first telegram — the body of the message — was, 'Have Grogan commence suit in Perkins' name.' Then — there was a cipher used for Moynahan's name — 'Moynahan means to make us trouble.' Then there was something followed, in the way of 'See Purmort,' or something of that kind." Again: "I was a little mystified by the expression 'Grogan,' and I telegraphed Mr. Kellogg: 'Does Grogan mean Gwynn, and also the amount due the men?'" To this telegram the witness testifies that he received an immediate answer, in substance as follows: "Yes, at once; followed with the amounts due the men." The witness further testifies that the Gwynn referred to was George R. Gwynn, an attorney resident at Alma.

That an attachment was to be issued in such suit is admitted, but it is claimed by the appellants that it was understood that such attachment would only be levied upon the personal property, while the witnesses for appellee testify that no such understanding was had. We attach little importance to this conflict, however; it now clearly appearing that the proceedings set on foot by Kellogg, acting for the company, actually resulted in the attachment and sale of its real property. The appellants' claim that such proceedings were carried to a greater extent than anticipated by it cannot have much weight in a court of equity as against the rights of *bona fide* purchasers deriving title through the sale made under the judgment rendered in such action. The evidence now also strongly tends to show that the three principal officers of the plaintiff company — Kellogg, Pomeroy and Whitaker — had notice as early as 1883 that its real estate had been attached and sold in the

Purmort and Moynahan suits. That Kellogg had such notice is shown beyond dispute; and here it may be said that it is a significant fact that plaintiff failed to call Kellogg as a witness in its behalf, although he was present, sitting by, at the trial. Kellogg's bias in favor of plaintiff is shown by his letters introduced in evidence. He was certainly well informed in reference to these matters; and his silence, under the circumstances, tends to create the belief that his knowledge was not of such a character as would benefit the plaintiff.

Upon the former appeal it was not shown that the company had notice of the sale of its real estate in time to avail itself of the statutory right of redemption. It is now apparent, however, that it had such notice in ample time. It is in evidence that the company was trying to raise money with which to redeem before the time for redemption should expire. Appellant not only failed to redeem, but allowed the years 1884 and 1885 to pass without making any effort to do the annual assessment work upon any of these claims, although such work was required by the mining laws under which they were claiming the property. From the time the sheriff's deeds were executed and delivered, in 1884, until this suit was commenced, in 1886, they permitted these defendants and their grantors to remain in the undisputed possession of the property without protest, permitting them to develop the same under the belief that they had acquired a good title thereto. No fraud is imputed to the defendants. By the silence of plaintiffs they were lulled into purchasing and making expenditures upon this property that they otherwise might not have made, although it is true they ultimately made a profit as the result of the hazard incurred.

Under these circumstances, we are to determine whether the court erred in dismissing the bill on account of the laches of the plaintiff. It is a familiar principle that courts of equity will only grant relief in cases in

which the application therefor is made promptly and without unreasonable delay, whatever may be the merits of the controversy. The necessity for the application of this rule to cases in which the subject-matter of the litigation is the right to unpatented mining property, the only value of which arises from the precious metals contained therein, is apparent. The value of such properties is always uncertain, and usually purely speculative. This case furnishes an illustration of the uncertainty of such values. At the time the attachments were levied the properties were considered of little or no value. The ore extracted would not pay the expenses of taking it out. In fact the suits were instituted for labor performed and supplies furnished in working the mine; the indebtedness arising on account of the necessary expenses exceeding the amounts realized from the sale of all ores extracted. Afterwards, by the labor and expenditure of these defendants and their grantors, the property was shown to be of great value; the ore extracted yielding a large net profit to those in possession and working the same. Although the original proceedings were irregular, should this plaintiff, after years of delay, be now allowed to reap the benefit of the expenditure and hazard incurred by others, and which plaintiff was unwilling or unable to take, becomes a pertinent inquiry in this connection. Upon this question the authorities are certainly with the defendants. Thus, in *Peebles v. Reading*, 8 Serg. & R. 493, it is said:

“Laches and neglect ought forever to be discouraged. There is in chancery always a limitation. Nothing will bring a court of equity into action but a pure equity, and a reasonable diligence. The strongest equity may be forfeited by laches, or abandoned by acquiescence.”

In *Sullivan v. Railroad Co.* 94 U. S. 811, the following is quoted with approval, and credited to *Smith v. Clay*, 2 Amb. 645: “Nothing can call forth this court into activity but conscience, good faith and reasonable dili-

gence. Where these are wanting the court is passive, and does nothing. Laches and neglect are always discountenanced; and, therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court."

In the case of *Attwood v. Small*, 6 Clark & F. 356, the lord chancellor was of the opinion that relief should be refused in reference to mining property for the reason that a delay of six months had intervened between the time at which the complainants acquired knowledge of the alleged frauds, and the bringing of the action.

In the case of *Ernest v. Vivian*, 33 Law J. Ch. 517, upon the subject of laches, the vice-chancellor says: "The subject-matter of this suit is the right to mines. Mining operations are of a particular character. They are an uncertain and speculative and hazardous adventure. * * * There is also a continual and increasing risk; for a mine profitable to-day may to-morrow become worthless. Similar observations have repeatedly been made by other judges. Now, if a person has a just right to mines of which he is not in possession, as against those who are in possession of and working them, and if he claims to be the rightful owner (the person in possession being aware of his rights or supposed rights), if such owner, not being prevented by fraud or concealment, stands by for a long period of time whilst those in possession are working the mines, this court will not lend him any assistance. * * * It is not equitable to allow him to wait till it is ascertained that the persons in possession have succeeded or may have been ruined, and if the subject result in profit, to ask to put that in his pocket; if in loss, to repudiate the loss. It is not necessary, even if possible, to prove whether he acted from premeditated design or carelessness."

In the case of *Pollard v. Clayton*, 1 Kay & J. 480, relief was refused for the reason that complainant had delayed eleven months after suit might have been brought,

and the court also refused to allow an amendment setting up excuses for such delay. The court says:

"Instead of that, the plaintiff waits eleven months, and then, at last, the bill is filed. I do not look out of the bill, as the case made has not done so; but it is enough for me to say that coal, like all other articles of constant use and constant sale, is a commodity fluctuating from day to day in its market price, and, during the interval which has elapsed, there may have been every possible variety of price, of rise or decline, and the parties are not now in the same position. * * * It is not equitable—and in this court, especially, it would be improper—to give relief of that description after such a period of delay as in this case has been allowed to occur between the time when the plaintiff was first in a position to file a bill, and the time when he took upon himself to file it. Having regard to the circumstances of delay alone, the court ought not to give relief after laches of this description."

In *Oil Co. v. Marbury*, 91 U. S. 592, Mr. Justice Miller, speaking for the court, says: "The fluctuating character and value of this class of property is remarkably illustrated in the history of the production of mineral oil from wells. Property worth thousands to-day is worth nothing to-morrow; and that which would to-day sell for \$1,000 as its fair value may, by the natural changes of a week, or the energy and courage of desperate enterprise, in the same time be made to yield that much every day. The injustice, therefore, is obvious, of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit.

"While a much longer time might be allowed to assert this right in regard to real estate whose value is fixed, on which no outlay is made for improvement, and but little change in value, the class of property here considered,

subject to the most rapid, frequent and violent fluctuations in value of anything known as property, requires prompt action in all who hold an option whether they will share its risks or stand clear of them."

Further quotations from the authorities are unnecessary, but the following cases will be found in support of the views quoted: *Hart v. Clarke*, 19 Beav. 363; *Jennings v. Broughton*, 5 De Gex, M. & G. 139; *Kinney v. Mining Co.* 4 Sawy. 447; *Williams v. Rhodes*, 81 Ill. 588.

Under our statute, bills for relief on the ground of fraud must be filed within three years after the discovery by the aggrieved party of the facts constituting such fraud and not afterwards. We cannot, however, give this statute such a construction as will permit a party in all cases to stand idly by until the limitation of the statute has nearly run, and then claim that, by virtue of the statute, he is excused from all laches. The statute fixes a limitation beyond which the courts cannot extend the time, but within this limit the peculiar doctrine of courts of equity should prevail.

We shall not extend this opinion. If points have been discussed by counsel that have not been passed upon in some one or more of the opinions in this case, it must not be thought that for that reason they have been overlooked. A careful consideration of the whole case convinces the court that the judgment of the court below should be sustained.

Affirmed.

ON REHEARING.

PER CURIAM. The petition for a rehearing in this case is so ably and exhaustively urged in the printed brief, and argument filed in support thereof, that it has been thought due to counsel to file this additional opinion in overruling the same.

Counsel in this argument say: "It is as true now as it was upon the first appeal that notice of the judgments

and sales is not brought home to the company." Let us see as to this. An examination of the new evidence discloses that the witness Duffy mailed early in September, 1883, the following letter, duly addressed, to Kellogg, at Denver, postage prepaid: "Sept. 5th. A. W. Kellogg, Esq.—My Dear Sir: The personal property of the Great W. M. Co. was sold yesterday by the sheriff. Prices were pretty good for a sale of that kind. The real estate was bought in for just enough to cover the judgments. A party wished me to ascertain who owns the Shamrock on Mt. Cameron. He wants to do the assessment work. You attended to this last year. All well. Yours truly, THOMAS W. DUFFY."

In the absence of evidence to the contrary, we must assume that this letter was received by Kellogg, in due course of mail, within a few days after it was posted; and, by the evidence of Bartley, it is shown that Kellogg was fully informed by him of such sale upon the 21st day of the month of November following.

William H. Hammond testifies: "I saw A. W. Kellogg in the office of the Great West Mining Company, in Denver, on May 31, 1883. Mr. Whitaker, who was also connected with the Great West Mining Company, was present. A. W. Kellogg was general manager of the Great West Mining Company at the time. I had a talk with them at that time, telling them if they could raise \$5,000 to lift those judgments they would have a good thing. Kellogg replied that they could raise no money. The judgments referred to were those claims assigned to John T. Perkins and the Moynahan claims. Kellogg also said that Pomeroy tried to raise the money, but could not. I asked them for money due me at that time, which was due me for work on the mine from January 18, 1883, up to May 29, 1883. What money was due me prior to January 18, 1883, was included in the Perkins suit."

In considering this evidence, it is to be borne in mind that Kellogg and Whitaker were two out of the three

directors of the defendant company,—the one general manager, and the other secretary and treasurer,—occupying the same offices, with constant communication with each other. Can it be said that the trial judge was not warranted in finding that Whitaker, at least, as well as Kellogg, had notice of the sales of real estate, notwithstanding the denial of Mr. Whitaker? Pomeroy is also shown to have had knowledge of these attachment suits as early as the fall of 1883. The evidence shows that the personal property brought less than \$500 at the sheriff's sale. That this was a fair price, under the circumstances, must be presumed. The Perkins and Moynahan judgments, with costs, aggregated something over \$3,000. Is it reasonable to believe that the officers of the company could have expected these judgments to have been paid from the proceeds of the personal property alone?

Kellogg, in all his acts, appears to have been governed by a desire to advance the interests of the Great West Mining Company; and we can find no foundation in the record for the charge made by counsel that he “leagued himself with the creditors of the company, and aided them, either actively or passively, in the work of fraud, concealment and spoliation.” It was only after he had failed to secure funds with which to pay the creditors of the company, and when Moynahan was on the eve of commencing suit by attachment for his claim, that he arranged for the laborers to attach the company's property as security for the amount due them in the development of the mines. By pursuing this course, it appears that Kellogg entertained the idea that the men would continue this work; and, as long as the work of development continued, there was a chance for the discovery of richer mineral, in which event the company might be benefited by such new discoveries, if made before the sale, or even before the expiration of the time for redemption. Under the circumstances, we cannot say that

his course was not prompted by a desire to benefit the company of which he was the general manager.

It is also said in support of the petition for a rehearing: "There is not a syllable of testimony to show that any officer of the company had any knowledge, notice or suspicion that these judgments were either fraudulently procured, or rendered without jurisdiction, until just about the time suits were brought." It does appear, however, that Kellogg, the general manager of the company, caused the Perkins suit to be instituted; and we think the testimony was sufficient to warrant the trial court in finding that both he and Whitaker knew the attachments had been levied upon the property; that the property had been sold as the result of such attachment proceedings; and that the purchasers were in possession, claiming and exercising the rights of owners. Here was certainly sufficient notice to demand further inquiry, and such inquiry would undoubtedly have disclosed all the facts in reference to the service upon Purmort, and the appearance of Gwynn. If such inquiry was not in fact made, it is quite immaterial whether the failure to make it resulted from negligence or design, or was rendered unnecessary by reason of the officers having full knowledge. They must be taken to have had notice of such facts as they would readily have ascertained, had they used ordinary diligence.

In the opinion recently filed in this case the following language is to be found: "Defendants were lulled into purchasing and making expenditures upon this property which they otherwise might not have made." And counsel say: "We fear some one must have dreamed all this, for there is absolutely nothing in the record to justify such statement." In this statement counsel is certainly in error. Although it may be proper, for some purposes, to separate the new from the old evidence, it is also proper to consider the whole; and, doing this, we find it to be practically conceded that the Wilsons paid \$2,000

as the first instalment upon the purchase price of this property, and they certainly had taken nothing out at that time. In addition to this, we have the uncontradicted testimony of Alfred H. Wilson to the effect that they (the Wilsons) had paid out about \$13,000 in working the mine since Gwynn turned it over to them, in addition to paying \$8,194, the original purchase price of the property; and it was agreed between counsel that, if Randall W. Wilson was on the witness stand, and the same questions were propounded to him that have been propounded to his brother, Alfred H. Wilson, his answers would be substantially the same.

In view of this testimony, and the manner of working the mine,—its remoteness from the ore market,—is not the court warranted in concluding that at least a portion of the \$13,000 was expended upon the property before any sum could have been received from the sale of the ore extracted, although such ore netted them a profit of about \$3,000? And there can be no doubt, under the evidence, that whatever sum was in fact so expended was expended upon the faith the Wilsons had in the title procured by them from the purchasers at the sheriff's sale.

Counsel say that this court "has given effect to evidence that was overwhelmingly contradicted by other evidence (which is not alluded to) and to have assumed conditions of fact against all the evidence bearing upon the questions." We have endeavored to demonstrate by the record that there is sufficient evidence to support the findings of the trial court in favor of the defendant, and to this end have, it is true, more particularly alluded to evidence tending to warrant the judgment. It was the peculiar province of that court to judge of the credibility of the witnesses appearing before it, and determine the weight to be attached to the testimony of each. Its opportunities for so doing were far better than ours, and, in obedience to well-settled rules, we must accept

its conclusions where the evidence is conflicting; it not appearing that the court misunderstood the evidence, or misconceived either its scope or effect, or that it acted unreasonably in determining its weight. There are upwards of one thousand folios in this record, and we cannot undertake to discuss in detail all the evidence contained therein.

It is maintained that the general subject-matter of this cause is of legal as well as equitable cognizance, and that, therefore, the court must be governed by the statute of limitations applicable to an action at law, instead of by the equitable doctrine of laches; the argument being that plaintiff could attack these judgments in an action of ejectment at any time within five years, and that it cannot be cut off from relief in this equitable action in a shorter time on account of its laches. To permit the plaintiff to attack these records, regular upon their face, in an action for possession of the property, under the code, in the nature of ejectment, would be to allow the judgment of a court of record to be destroyed in an action in which the pleadings would give no notice of any claim that the judgments were invalid. We cannot concede that this may be done. Public policy, as well as the spirit of the code, require that the opposite party shall be apprised by the pleadings of the nature of the defect relied upon to defeat such judgments. As a rule, a judgment of a court of general jurisdiction is not void unless it appears from the record itself that the court in pronouncing it acted without jurisdiction. A judgment rendered without bringing the defendants into court is not for this reason void, but voidable only, unless the failure to obtain jurisdiction over them appears from the record. *Allen v. Huntington*, 16 Am. Dec. 702; *Freem. Judgm.* § 116; *Owens v. Ranstead*, 22 Ill. 161; *Ridgeway v. Bank*, 11 Humph. 523; *Hahn v. Kelly*, 34 Cal. 391.

That this distinction has been kept constantly in mind

by this court is quite apparent from the qualification expressed in each instance in which the judgments are alluded to in the former opinions of this court as being "absolute nullities" under certain conditions.

The proceedings being regular upon the record, the judgments can only be avoided upon extraneous evidence. For the reasons given in the opinion recently filed, in our judgment, appellant, by its laches, is now shown to be precluded by well-settled rules from showing the invalidity of the judgments. The petition for a rehearing must be denied.

Rehearing denied.

MOFFATT, EX'R, V. CORNING.

1. SET-OFF—LEGAL EFFECT OF A PURCHASE BY A DEBTOR OF HIS OWN CONTRACT OBLIGATIONS FROM ONE WHO OBTAINED THEM FROM HIS CREDITOR AS COLLATERAL SECURITY.—The attachment creditor of a mining corporation entered into a written contract with a prior judgment creditor of the same corporation, whereby he stipulated to purchase in his own name the debtor's mining property, at the judicial sale thereof, and to work the property for the benefit of both, with an option to either pay the claim of the prior judgment creditor, and thus obtain full title to the property, or to resell it and after payment of all claims against it to divide the surplus with the other party. The latter party assigned this contract, together with his judgment, to one to whom he was indebted, as collateral security. The attachment creditor, having purchased the property, in pursuance of his contract, purchased the contract itself from the assignee thereof, without any negotiation with the judgment creditor, obtaining also at the same time a transfer of the latter's judgment, the consideration being the payment of a certain sum of money in full satisfaction and discharge of the assignee's demand against the judgment creditor. The legal effect of the latter transaction was simply to entitle the purchaser to a credit on his contract with the judgment creditor of the sum actually paid the assignee for the transfers—not to invest him with such absolute ownership of the contract and judgment as to operate as a satisfaction or release of his contract obligations with the judgment creditor.

2. **SAME — LIABILITY OF THE ATTACHMENT CREDITOR TO ACCOUNT FOR PROFITS REALIZED FROM OPERATION OF THE MINE.**— In an action to compel the attachment creditor to account for the profits realized from working the mine, as provided by the contract, and it appearing that the parties thereto had never entered into any agreement or stipulation for its revocation, he was properly held liable, less the sum paid by him for the assignment and transfer of the contract and judgment.
3. **EVIDENCE — EXCLUDING MATTERS OF MERE OPINION.**— A statement on the witness stand by the party to whom the contract and judgment had been assigned as collateral security, that he considered the judgment creditor's judgment paid and settled on receipt by himself of the price of the transfers, was properly excluded as being simply his opinion of the legal effect of the transaction.

Appeal from District Court of Arapahoe County.

UPON the 18th of November, 1875, appellee commenced a suit by attachment, in the district court of Boulder county, against the Nederland Mining Company. On January 18, 1876, he obtained a judgment for the sum of \$32,490 and costs. Upon the 5th of January, 1876, Jerome B. Chaffee commenced a suit by attachment against the same defendant, in the same court, for the sum of \$46,616.66. On the 7th of January, 1876, Anker and Shaffenburg commenced an attachment suit in the same court, against the same defendant, for \$13,632.55. The last-named suits were brought to the same term of court, and were pending and undetermined at the date of the making of a contract hereinafter set forth. About the same time, or prior to the bringing of the above suits, James Pepin commenced a suit against the same defendant, in the same court, for himself and others, to enforce a miner's lien against the Caribou lode, the property of the Nederland Mining Company, and upon the 21st of January, 1876, obtained a decree for \$22,772.73, wherein it was decreed that, if the defendant mining company should fail to pay the amount on or before the 21st of August ensuing, the property should be sold, and a deed executed to the purchaser. While affairs were in

this condition, on the 1st of June, 1876, appellee, who obtained the judgment as stated above, and Chaffee, made and executed a contract which, after setting out the facts above stated, proceeds: "That it is doubtful whether said company will pay any of said claims, except by process of law, out of its property; that Chaffee owns the claim of Anker and Shaffenburg, and that it is desirable for Corning and Chaffee to unite their efforts to obtain payment of their claims against said company: Therefore, the contract witnessed, that Chaffee and Corning agreed to purchase the liens against said company, or such part as could be procured, on the best terms possible, and that when purchased they should hold such liens jointly; that Corning should not be required to advance any money on account of these purchases, but reserved the right to advance such amounts as he saw fit. Chaffee was to furnish all the money required, and the liens were to be owned by Corning and Chaffee in proportion to the amount of money advanced by each. *Second.* That, after the purchase of said liens, if the company failed to pay the amount of the decree the property should be sold under it, and, if no bid could be obtained sufficient to pay the liens and claims of Chaffee and Corning, the property was to be bid in by Chaffee, and in that event Chaffee was to pay the amount of the bid, and the property was to be held by Chaffee in trust for himself and Corning, as hereinafter stated; that, if the title was acquired by any other person acting for Chaffee, the title was to be held in trust as aforesaid. The interest of the parties was to be determined as follows: Chaffee's interest was to be the amount of his claim against the company, taken at \$51,000, with interest at ten per cent. per annum from the date of this contract, added to the amount paid out by him in the purchase of said liens, with interest and costs of sale paid by him; Corning's interest was to be the amount of his judgment against the company, interest and costs of suit, added to

whatever money he should pay out to purchase said liens, with interest; that the sum total of the two claims as above made was to be taken as the unit of value of the property, and the interest of each was to be the proportion that the claims of each bore to the unit of value. *Third.* That as soon as the title could be procured to said property, as aforesaid, Chaffee was to proceed by sale, under execution or otherwise, to get title to the mill owned by said company, and was to endeavor to sell the mine for an amount sufficient to pay Corning's judgment and his own claim, and not for a less sum; that if, by the sale of said lode, enough money was not realized to pay Corning's judgment, and the property was held in trust, as hereinbefore provided, the mill property should be sold under Corning's judgment, or any other lien, and, if redeemed, the redemption money was to be divided between Corning and Chaffee in the proportion that the lode property was held; that if not redeemed, and the title vested in Chaffee, or any one for him, it was to be held in trust by Chaffee in the same proportion; that at such sale the mill property might be bid off by Chaffee or some one for him, and such purchaser would not be required to pay the bid in cash, but the amount should be applied to Corning's judgment. *Fourth.* If the property before described shall be held in trust as aforesaid, the trustee may work and mine the said lode property, or run and use the said mill, and all profits realized therefrom shall be divided between the said Chaffee and Corning according to their respective interests in said property, but the said Corning shall not be liable for any loss sustained in working said property, or running or using said mill. Neither shall any incumbrance be placed on the said property, or any part of it, or any lien be allowed on the same. The said Chaffee may at any time, by payment to the said Corning or his legal representatives of the said judgment, interest and costs, together with the amount he may have paid out in purchasing said miners'

liens and interest thereon, discharge the said trust; and, on the payment of said sums of money as aforesaid, the said Chaffee shall hold the said property, and every part thereof, discharged of any claim of the said Corning thereto. If the said Corning shall receive any money by the redemption of mill property, or by the payment of any money to him on his judgment out of any sums of money bid at such master's sale of said property under such miners' liens, the amount so due him as hereinbefore stated (to be determined by taking the amount of the judgment, interest and costs, and the amount he shall pay for said miners' liens) shall be decreased by the amount so received, and his interest in said property shall be decreased in the proportion that the amount so received bears to the total amount treated as the unit of value. It is the intent of the parties hereto that the said Corning shall be paid out of the amount bid for said property, or out of the amount realized on the sale of the property, if it is held in trust as before stated, the full amount of his judgment, interest and costs, and all moneys he may have used in purchasing miners' liens, and interest thereon. *Fifth.* That in case Chaffee can sell said mine or mill, or both, he shall pay Corning the amount of his judgment, interest and costs, and whatever moneys Corning may have advanced in the purchase of liens, with interest. *Sixth.* That Corning shall aid and assist Chaffee in every way to effect the purposes and objects of this contract. If, at the sale under the decree for a miner's lien, Chaffee shall be compelled to bid an amount greater than the amount of the lien, Corning shall not demand a distribution of the surplus without the consent of Chaffee; but, if a distribution is made, the amount allotted to Corning shall be received by him for and on account of Chaffee, and shall be paid to Chaffee. If the property be held in trust, and not sold, and Corning shall not be paid the amount due him within ninety days from date of the sale under the miners'

liens, then, when Chaffee does make a sale, if the property shall be sold for more than enough to pay himself and Corning, the balance shall be divided in the proportion of their respective interests to the unit of value."

On the 19th of October, 1880, Corning instituted this suit against Chaffee, and in his complaint, after setting out the foregoing contract, alleges, in substance, that the Caribou lode, one thousand four hundred feet in length, was sold under the decree in the Pepin suit, and bought by Chaffee for \$64,000; that on the 15th of September, 1876, a deed of it was made and delivered to Chaffee; that Chaffee entered into possession of the mine, and worked it; that afterwards the mill-site and mill were sold at sheriff's sale, and bought by Chaffee, and he acquired title to them. It is also alleged that upon the 8th of November, 1876, Corning was indebted to the Colorado National Bank and C. B. Kountze in the sum of about \$30,000, and that to secure its payment he assigned his contract with Chaffee to Kountze by a written contract in substance as follows: Empowers Kountze "to receive all moneys due or to become due, and also to receive a deed for the interest of Corning in the property described in the contract, and also empowers Kountze, out of any moneys received on said contract, to pay himself and the Colorado National Bank the amounts due them from Corning, or, if sufficient money be not received by Kountze to pay said amounts, he shall receive the deed for the property, and hold the same in trust for the payment of such moneys; and, in case sufficient money be not received on or before the 1st of September, 1877, to pay Kountze and the bank, the former is authorized to sell the property to pay himself and the bank, and the surplus, if any, to be paid to Corning."

It is also alleged that on the 17th of April, 1879, Corning borrowed from Chaffee \$30,000 to pay the amount he owed the Colorado National Bank and Kountze, and made his note for the same with interest at ten per cent. payable on demand; that Chaffee paid Kountze the

amount, \$30,000, and took an assignment of the contract between Corning and Kountze, as follows: "Denver, Colo., April 17, 1879. For and in consideration of the sum of \$30,000, I hereby, with the consent of George C. Corning, assign and transfer all my right, title and interest in and to the annexed contract regarding the Caribou property to Jerome B. Chaffee, said contract entered into between Jerome B. Chaffee and Geo. C. Corning on the 1st day of June, 1876, and held by me as collateral security for indebtedness due to myself and the Colorado National Bank of Denver from said Corning, which sum of \$30,000 is to be received by me in full of said indebtedness; it being the intent of this assignment to give to said Jerome B. Chaffee all the rights I have in said contract, and none other, without recourse on me in any event. C. B. KOUNTZE.

"I hereby consent and agree to the above assignment. GEO. C. CORNING."

It is further alleged that on the 25th of April, 1879, Chaffee sold and conveyed the mine and mill property to the Caribou Consolidated Mining Company for a sum sufficient to pay all claims of himself (Chaffee) and Corning; that Chaffee still retained Corning's note for \$30,000; that he had not paid him any part of the purchase money received from the sale of the property; had not paid his judgment against the Mining Company Nederland, nor any part; and avers that there was due him \$50,000 for the judgment, and that, if there was any surplus in the hands of Chaffee after paying off the claims provided for in the contract, he was entitled to a portion of it. Prays for an accounting, and for a decree for what might be found due.

On November 17, 1880, an answer was filed by Chaffee; on November 24, 1880, a replication. Upon February 29, 1884, leave was obtained of the court, and an amended answer filed; of which only portions are necessary to be noticed.

Defendant denies that he, on the 17th of April, 1879,

or at any time, loaned plaintiff \$30,000 to pay the debt due from him to Kountze and the bank. Denies that he ever received a note for \$30,000 from plaintiff, or that he then held and controlled such a note. Denies that any such note was made at his request, or for his use, or was ever delivered to him, or to any one on his behalf entitled to receive the same. Avers, in effect, that he never loaned money to plaintiff to pay Kountze and the bank; that plaintiff never paid money to Kountze and the bank. Admits, on information and belief, that on the 17th of May, 1879, plaintiff executed a note for \$30,000 and interest, and left it with some clerk or person in the First National Bank. Avers that, at the time he was in New York, knew nothing of it; never authorized any one to receive it. Avers that, by the contract of assignment from plaintiff to Kountze of April 17, 1879, Kountze became the absolute owner of plaintiff's judgment against the Mining Company Nederland, and the absolute owner of all interest plaintiff had before that time in the contract made by him with defendant of June 1, 1876, by reason of the assignment of plaintiff to him. And further avers that on the 17th of April, 1879, plaintiff was indebted to Kountze and the bank in the sum of not less than \$40,000, and that on that day defendant purchased from Kountze and the bank, for the sum of \$30,000, such indebtedness of plaintiff, with his full knowledge and consent, and that Kountze and the bank received the amount as full payment of the amount due them from plaintiff, and released and discharged him, and that such sum was a full and complete payment of the judgment of plaintiff against the Mining Company Nederland, and of all claims and dealings between plaintiff and defendant, and in full discharge of all the covenants and agreements contained in the contract of June 1, 1876, between plaintiff and defendant, and that, upon the assignment to him (Chaffee) by Kountze of the judgment and contract, he took them

free from all claims and liability by reason of the former agreement. Averring, in effect, that the payment of the \$30,000 to Kountze was a settlement and payment in full of all matters between defendant and plaintiff, and that defendant was discharged of all trusts arising under the contract. Denies all indebtedness, and plaintiff's right to an accounting.

On June 11, 1885, a replication was filed to the amended answer, denying all the important allegations, and specifically denying any agreement with defendant whereby the contract of June 1, 1876, should be canceled, or in any way affected, except that the sum of \$30,000 paid by defendant to Kountze should be taken as part payment by plaintiff of the amount due, and to become due, on the contract.

The trial was had before the court June 11, 1885, resulting in a judgment in favor of plaintiff for \$14,570, from which this appeal was taken.

Mr. L. C. ROCKWELL, for appellant.

MESSRS. TELLER & ORAHOD, for appellee.

REED, C. This litigation grows out of the misunderstanding of the parties in regard to important transactions between them. After the making of the contract by appellant and appellee of June 1, 1876, on the 8th of November of the same year, appellee, being indebted to the Colorado National Bank and Charles B. Kountze in the sum of about \$30,000, assigned the contract made with appellant, and with it the appellee's judgment against the Mining Company Nederland, and all rights and equities in the contract, and transferred them to Kountze. This transaction was one entirely between Corning and Kountze, Chaffee not having been a party; and it is not shown that he had any knowledge of it, or in any way participated or was present. As far as is shown, matters remained in this condition until April, 1879, when, Chaffee

being in New York and Corning in Denver, the former entered into negotiations in New York with Augustus Kountze, who represented the Colorado National Bank and C. B. Kountze, in regard to the indebtedness of Corning to them, which resulted in an arrangement whereby Kountze and the Colorado National Bank were to receive \$30,000 in full discharge of Corning's indebtedness, amounting then to something over \$40,000, and Kountze was to assign to Chaffee the same securities assigned to him by Corning. Corning's consent to the transaction was to be obtained. It appears that C. B. Kountze and Moffatt were telegraphed to secure such consent from Corning. On the 17th of April the transaction was completed. About that time the money (\$30,000) was paid, and the assignment by Kountze to Chaffee, as set out above, was executed.

The first question presented for determination is what the character of the assignment from Corning to Kountze of the 8th of November, 1876, was, and the intention of the parties, and its legal effect. It is contended in argument by appellant's counsel that it was an absolute sale and transfer of the judgment against the Mining Company Nederland, and likewise of all Corning's right, title and interest in and to the contract between himself and Chaffee, while, on the part of Corning, it is urged that the transaction was a transfer by assignment to Kountze as collateral security of the indebtedness. The assignments were made by the execution by Corning of two different instruments contemporaneously,—one, of the judgment, absolute and unconditional in its character; the other, of the contract, in substance as follows: That, in consideration of one dollar paid, and in further consideration of the premises to be kept and performed by Kountze, etc., Kountze is empowered — *First*, to receive all moneys due or to become due; *second*, to receive a deed of the interest of Corning in the property described in the contract, if such deed should be made; *third*, out

of any moneys received on the contract, *to pay himself and the Colorado National Bank the amounts due from Corning; fourth*, if sufficient money was not received by Kountze to pay the amounts, he was to receive the deed to the property, *and hold the same in trust for the payment of such money; fifth*, if sufficient money was not received by the 1st of September, 1877, Kountze was authorized to sell the property *to pay himself and the bank, and the surplus, if any, to pay to Corning.*

Taking the provisions and language of this assignment, unsupported by other testimony, it is apparent that it was not, nor intended to be, an absolute sale and transfer, divesting Corning of all interest in the contract with Chaffee, and substituting Kountze in his stead. Such construction, instead of being in harmony, would directly contradict the expressed intention of the parties. Corning and Kountze were the only parties to the contract of assignment. No question arose between them as to the legal effect or the intention of the parties. It was by both, at all times, treated and regarded as a transfer and assignment as collateral security for the payment of the indebtedness, not as abrogating the contract between Corning and Chaffee by substituting Kountze in the place of Corning, but leaving the contract between them in full force. There is another view of the matter; Corning, by the contract with Chaffee and the mutual agreements and covenants, had disposed of all interest in the matters to Chaffee. Chaffee, by virtue of the contract, was the owner of the very property and rights in action that are claimed to have been transferred to Kountze. What Corning was to receive under the contract was money — nothing else — absolutely; and, under any circumstances, the amount of the judgment against the Nederland Company, and any money he might pay for the purchase of claims, with interest on the same, was to be repaid. Chaffee was to have the title to the property, — hold and work it, — and his trust might be dis-

charged by the payments above mentioned at any time, or he might, at his own election, sell the entire property at any time for a sum sufficient to pay all claims and charges; and, if the price obtained should exceed them, then the surplus was to be divided on an agreed basis, and Corning was to receive his proportion. In any event, what Corning was to have was money from Chaffee. At the time it was claimed that Kountze bought the judgment from Corning, Corning was not the owner of it. It belonged to Chaffee. The assignment to Kountze was an idle proceeding, of no legal effect. What he did assign was by virtue of the assignment of the contract, and that was a right to take the money in accordance with the provisions of the contract, instead of Corning, when Chaffee was by its terms required to pay. Kountze was not a party to the contract of Chaffee and Corning. Chaffee was not a party to the contract between Corning and Kountze. The absolute property in the judgment was in Chaffee. Corning could not assign it, and pass a title. Neither could the contract have been assigned to Kountze by Corning, and Kountze be subrogated to his right, unless it was done by the act of Chaffee, by his joining in it. 2 Add. Cont. 839-842; 1 Pars. Cont. 220; 2 Chit. Cont. 1380, and authorities cited in note.

Upon the trial, C. B. Kountze testified, in answer to a question in regard to the judgment of Corning against the Mining Company Nederland: "We simply held it as collateral. We had not bought it. It was ours as a collateral." He further says: "Upon the 8th of November, 1876, Corning's debt to me was still unpaid. The assignment was taken only as collateral security for the debt. Corning owed myself and the bank; and on the 17th of April, 1879, we were still holding it as collateral security." Corning testified to its having been assigned to and held by Kountze as collateral security. Corning and Kountze having been the only parties to the contract or assignment, and both agreeing as to what the transaction

was, it cannot, at the instance of a third party, be declared to be an absolute sale, contrary to the intention of the parties who made it. Neither will the law warrant the court in saying it was an absolute sale by reason of the language used in the assignment of the judgment, when it is shown by the evidence of both parties that it was not their intention that it should be. The assertion of absolute ownership could only have been by Kountze. Having disclaimed it, he could not be invested with it by any act of a third party. There is a further incident that may deserve comment. If Chaffee, at the time of the transaction with Kountze in New York, regarded the transaction between Corning and C. B. Kountze as an absolute sale, which divested the former of all interest in the judgment and contract on the 8th of November, 1876, why did he, on the 17th of April, 1879, require the consent of Corning to be obtained before he would make the deal?

It is clear that by the subsequent assignment made by Kountze to Chaffee, the latter could take by the assignment no greater or better title than Kountze had held. In the assignment of Kountze to Chaffee of April 17, 1879, of the contract between Corning and Chaffee of June 1, 1876, is the following language: "And held by him as collateral security for indebtedness due to myself, and the Colorado National Bank of Denver, from said Corning; * * * it being the intent of this assignment to give to said Jerome B. Chaffee all the rights I have in said contract, and none other." Consequently, by virtue of the transaction with Kountze, aside from anything that may have occurred in connection with Corning, Chaffee, having paid and discharged the debts of Corning by compromise or composition, and succeeding to the securities, held them, by virtue of the assignment, only as collateral for the sum of money advanced; he was substituted for Kountze, and held the same collateral security for a less sum of money by reason of the

advance or loan of the \$30,000. It will be observed that by the terms of the contract entered into between Chaffee and Corning, Chaffee had obligated himself to pay, in any event, the amount of Corning's judgment against the Mining Company Nederland, with the interest. It does not appear that, by the terms of the contract, stipulated events had occurred to make the money due, so that Corning could have demanded the payment. But it was optional with Chaffee at any time to relieve himself of all subsequent liability by the payment in full of that claim.

The act of Chaffee in making the payment of \$30,000 at the time can only be regarded as falling within one of the three following propositions: *First*, that it was a loan of that amount to Corning, to be subsequently settled and adjusted; *second*, that by the deal with Kountze all parties were relegated to their original *status* under the contract, with \$30,000 of the money due Corning paid by Chaffee; or *third*, that, by a subsequent contract made between Chaffee and Corning at the time of the payment to Kountze, the former contract was abrogated, and it was agreed that the amount paid Kountze should be accepted by Corning as payment in full under the contract and Chaffee discharged from all further liability.

The testimony is very vague and indefinite. Chaffee was in New York, dealing with a representative of Kountze, while Kountze and Corning were in Denver. It is unnecessary to say that Corning could not be bound by any understanding or agreement between Chaffee and Kountze to which he was not a party. It is evident that, in contemplation of law, there was no contract between Chaffee and Corning. At the very time of closing the transaction, each was acting on a theory of his own, and at variance with that of the other. Corning supposed it to be a loan, and it appears that C. B. Kountze so supposed it; and they thought it necessary for Corning to make a note for the amount, which he did, and delivered

to some one in the First National Bank, supposed to represent Chaffee. It is in evidence that no note was required or authorized by Chaffee, and that it was never accepted or received by him, or an authorized agent in his behalf. The theory of a loan was abandoned upon the trial, and was not urged in argument, for the obvious reason that no contract for a loan was made, or could be proved. The fact was established that no person in the First National Bank was authorized to receive the note. It sufficiently appears that the officers of the bank participated to some extent in the transaction as representing Chaffee, and it appears that they had no definite knowledge of what the real character of the transaction was; but it is fair to presume that their agency or duty was such as to require them at least to inform Chaffee of the delivery of the note, and the light in which the transaction was regarded by Corning. Yet it appears that there was no effort made to inform Corning of Chaffee's view of the matter until a long time after, and no offer or attempt to return the note, and it remained in the custody of the bank to the time of the trial.

The second of the above propositions needs no discussion. It results as a conclusion of law, unless the new contract was established.

The third proposition is not without difficulty, and its solution practically disposes of the case. If a contract was made, the two parties radically disagree as to what it was. Chaffee construes it to have been such that, by payment of the \$30,000 to Kountze in the way of compromise, and the discharge of Corning from further liability, and the transfer of securities held by Kountze, he took them divested of all obligations assumed in the contract, and that the payment of the \$30,000 by him canceled his obligation to pay the judgment of Corning against the Mining Company Nederland, of \$32,490, in January, 1876, with interest to April, 1879, amounting to over \$10,000, making the aggregate debt at that time

over \$42,000. Corning asserts, in the first instance, the transaction to have been a loan of the \$30,000; when that position was found untenable, then that it was a payment of that amount on account under the contract. Without consent from Corning, Chaffee had an undoubted right to buy from Kountze the indebtedness of Corning at any agreed price, and taking by assignment any security held by Kountze, and could, upon settlement, have exacted from Corning the whole amount. To have done this, the evidence of indebtedness should have been assigned to him, as well as the securities. He would then have had the title to the indebtedness, and the same security Kountze held, unless, by the merger of the two, he was relegated to his original contract. Had it been his intention at the time to make for himself the difference of \$12,000 and over by the transaction with Kountze, this would have been the proper and rational course; but this was not done. The evidences of Corning's entire indebtedness, on the payment of the \$30,000, were canceled and delivered to Corning, evidently by the order or consent of Chaffee, while the securities held for the indebtedness by Kountze were assigned to Chaffee, and could only have been held by him legally, as security for the \$30,000 advanced, unless by special contract with Corning. Having had in the first instance, as shown, a right to elect whether he would treat the transaction as a purchase or as a loan, or an advance under the contract, he must be held to have made his election; and having made it, and it having been acted upon, it was final and conclusive. It is a primary and elementary principle that in the making of a contract the minds of the contracting parties must meet. Without this, there is no contract. As is said in 1 Chit. Cont. 11: "There must be, first, the reciprocal or mutual assent of two or more persons." In Add. Cont. 1: "Every contract includes a concurrence of intention between two parties." In *McNulty v. Prentice*, 25 Barb. 204, it is said: "A contract

(*con-tra-ho*) is a drawing together of minds until they meet." In 1 Pars. Cont. 475, it is said: "There is no contract unless the parties thereto assent, and they must assent to the same thing in the same sense." See *Hazard v. Insurance Co.* 1 Sumn. 218.

In order to have abrogated or annulled the contract existing between Chaffee and Corning for the payment of the entire amount of Corning's judgment and interest, and a portion of any surplus that might remain on the sale of the property which Chaffee had obligated himself to pay absolutely, there must have been a new contract taking the place of the old one, whereby Corning agreed to accept a less sum in full, and on the receipt of such sum release Chaffee from further liability. This would have required a proposition on the part of Chaffee to purchase, cancel and discharge all debts and obligations of Corning's to Kountze and the Colorado National Bank, in consideration of Corning accepting the same in full satisfaction of all liability on the part of Chaffee arising or growing out of the contract, and an acceptance of the proposition by Corning. Was there a contract of that kind, or of any kind, established by the evidence?

Chaffee testified: "Augustus Kountze, of New York, agreed with me that he would take \$30,000 in full for his debt against Corning, and also in full for the contract that I had that he had assigned. He would assign it over to me for \$30,000; but I was not exactly satisfied with taking that assignment, knowing that I had been a trustee in the matter, and for that reason I had it referred back here to Mr. Moffatt to get Mr. Corning's consent to that assignment from Mr. Kountze to me; and, if he could get that consent, I told him I would give him the \$30,000. I would give Kountze the \$30,000, which should pay in full the Corning debt, provided Corning would agree to it and make no claim upon me whatever. That was Corning's debt to Kountze and the bank. The

understanding between Augustus Kountze and myself was, and the agreement was, that, if that was assigned to me, that canceled my contract with Corning. That was our understanding, and I wanted Corning's assent, which was obtained here in Denver and telegraphed me, and I paid the money." Upon cross-examination he testified: "I did not have any conversation with Corning personally about the transaction. By the Court: Mr. Chaffee, were there any other written negotiations or written instruments in reference to this transfer, other than those that have been read here to-day, which you had any knowledge of,—as your contract with Corning, his assignment to Kountze, Kountze's assignment to you; those three instruments? Answer. I think that comprised the whole, with Corning's consent that he should transfer this contract to me. Question. Other than the assignment of judgment that Mr. Rockwell has just introduced in evidence? A. I think that was all. That was all I thought I needed. Q. This consent you speak of is what is marked on that assignment of Kountze's to you? A. I presume it was. It was telegraphed to me that he had consented to have the transfer made. Q. You had no knowledge to what extent that consent of his went,—only your talk with Kountze? A. I thought I knew what it meant. Perhaps I didn't. I guess I didn't, according to your idea of it. Q. Whatever you thought was derived from your talk with Augustus Kountze, was it not? A. It was, and derived from our dispatches, letters, and documents and papers, back and forth. Q. You have never seen or heard of any other consent of Mr. Corning's, or anything relating to this contract, except such as is indorsed on that contract? A. I don't know of anything. The original contract between myself and Corning was delivered to me by Kountze. The original contract in the assignment of the judgment was what I understood was assigned to me."

Corning testified: "I understood that he [Kountze]

was selling this contract, and he was delivering over the collateral of mine that he held. The payment of the \$30,000 settled between Mr. Kountze and myself, and he assigned my collateral to Mr. Chaffee in the settlement. Q. And he surrendered to you everything you owed him and the Colorado National Bank? A. Yes, sir; he gave me my notes. Q. Did you not assent to this assignment upon the condition, and only upon the condition, that the bank should release you from all your obligations? When I say the bank, I mean the bank and Kountze together. A. The \$30,000 went to pay Mr. Kountze, and he assigned this to Mr. Chaffee as the collateral for the other \$30,000, and I consented. He assigned this as collateral to Mr. Chaffee, and to that I consented."

This is all the testimony of any importance on the point, and it certainly is not sufficient to establish such a contract as is contended for by appellant. There is no evidence that Chaffee, or any one, informed Corning that the \$30,000 to be paid was to be in full of all claims growing out of the contract; and the only evidence that such was the understanding of Chaffee is his own, when he states that to have been the understanding or contract between him and Augustus Kountze. It is needless to say that any understanding or agreement between himself and Kountze could not affect the interest of Corning unless he was a party to it, or informed of the extent of the transaction as claimed by Chaffee. Chaffee may have supposed and intended that the fact would be communicated to Corning here, but there is no evidence that it ever was; nor can such knowledge be predicated upon his consent to the transaction. He was informed that Chaffee proposed to pay off his entire indebtedness of over \$40,000 for \$30,000, and that his notes were to be canceled and delivered to him,— a transaction clearly for his benefit; and his only care was to assure himself that he was fully released from such indebtedness. The consent obtained, and the extent of it, can only be determined by

the written document upon which it was indorsed, and it cannot lawfully be extended. The paper was the assignment executed by Kountze to Chaffee, whereby, for the sum of \$30,000, he assigns and transfers all his right, title and interest in the contract held by him as collateral security for indebtedness due himself and the Colorado National Bank, etc., upon which is indorsed: "I hereby consent and agree to the above assignment," which is signed by Corning. Comment upon the extent and intention of the consent is unnecessary. It is apparent at a glance that the consent only extended to agreeing that that document should be assigned to Chaffee, and held by him as collateral security in the same way it had been held by Kountze for the \$30,000 paid Kountze.

It has already been shown that, had the indebtedness of Corning, and the securities for it, been transferred to Chaffee, he would have been subrogated, and his relation to the indebtedness and securities would have been the same as that of Kountze. Such was not the case. The debt, which was the principal, had been canceled. Hence the two were separated. "'Collateral,' in its common use and acceptation, means additional, subsidiary security given to secure the principal obligation. It is a separate obligation." It is said in *Coleb. Coll. Secur.* § 2: "Such collateral security stands by the side of the principal promise as an additional or cumulative means for securing the payment of the debt." Judge Redfield, in a note to *Le Breton v. Peirce*, 1 Am. Law Reg. (N. S.) 38, says: "The etymology of 'collateral security' indicates that it is something running along with, and, as it were, parallel to, something else of a similar character. It is collateral to the original indebtedness."

It will be seen that by the consent of Corning, and the transfer of the collateral, it could not have been transferred as security for, and to the amount of the indebtedness formerly held by, Kountze, as that had been extinguished. Hence it was, by the acts of the parties,

transferred to Chaffee, not to secure the original debt, but the new debt created from Corning to Chaffee; and that debt, as shown, unless by an agreement, could not have been greater than the advance — \$30,000. That Chaffee expected and intended to himself receive the benefit of the transaction, and make the difference of some \$12,000, is apparent. Otherwise no motive can be found for making the transaction. That he thought he had done so is apparent. That he did not was by reason of the error committed in dealing with Kountze instead of Corning, and also by an error regarding the law of the case, in supposing he could buy from Kountze the security, and take an absolute title divested of all equities and obligations formerly existing. It follows that no subsequent transaction relieved him from the obligation assumed in the Corning contract, and the payment of the amount of the Corning judgment and interest.

The errors assigned are practically disposed of, except the first: "That the court erred in refusing to allow defendant to prove by Kountze that the judgment of Corning against the Mining Company Nederland was part of the consideration for which defendant paid Kountze \$30,000, and that the judgment was paid off and settled by this \$30,000, and was so understood between Kountze and Chaffee at the time." The assignment embraces two propositions. In regard to the first, it may be said that Kountze was examined and testified at length in regard to what the transaction was, and of the facts within his knowledge. From the facts and documents executed by Kountze the whole matter had been explained. The defendant could not have been prejudiced by the refusal of the court. It could have been, at most, but the opinion of Kountze from the facts already before the court. The latter part was very properly excluded. It only asked for the opinion of the witness as to the legal effect of the transaction, which could only be determined by the court. The last clause, as to how it was understood be-

tween Chaffee and Kountze, was unimportant, as already shown. The pertinent inquiry was, how it was agreed and understood between Chaffee and Corning.

The judgment of the district court should be affirmed.

RICHMOND and PATTISON, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

Affirmed.

MR. JUSTICE ELLIOTT, having tried the cause as district judge, did not participate in this decision.

14	125
17	291
14	125
4a	307
4a	371

BUTLER ET AL. V. LEWIS C. ROCKWELL, SURVIVING
PLAINTIFF, AND GAGE ET AL., EX'RS, ETC.

1. ASSIGNMENT OF CONTRACTS — A STIPULATION AGAINST THE ASSIGNMENT OF A CONTRACT NOT VIOLATED BY ITS ASSIGNMENT AS COLLATERAL SECURITY.— A provision in a contract for the sale of land that it should not be "assignable or negotiable," and that the purchase money should be payable to the vendor, and "only to him, and none other," is not violated by the vendor assigning the contract as collateral security, as the only effect of such provision was to prevent the title to the chose in action from passing to another so as to preclude defendants from asserting any equity or defense that might arise between the original parties.
2. WHO ARE PROPER PARTIES TO AN ACTION BROUGHT TO ENFORCE SUCH A CONTRACT.— (1) The assignee has such an interest in the contract as makes him a proper party to an action to enforce it. (2) The vendor, after such assignment, still retains such an interest in the contract as makes him a proper party to an action for its enforcement. (3) After the death of the vendor, pending such litigation, his executors have the right to be substituted as parties, and such right is not extinguished by the act of the assignee in asking to be made sole plaintiff, and the order of the court in making him such; nor does such order work a discontinuance as to the executors, though made with their full knowledge. Neither does the fact that, by making the executors parties to the action, defendants were rendered incompetent to testify as witnesses in their own behalf, affect the right of the executors to become parties.

2. DEFENSE OF MISREPRESENTATIONS IN SALE OF PROPERTY — ESTOPPEL BY CONDUCT — RATIFICATION OF SALE.— Where purchasers of mining property enter into possession, and, after finding that they have been deceived by misrepresentations of the seller, fail to either rescind the contract of purchase or affirm it, and bring an action for the deceit, but continue to exercise acts of ownership, they are estopped from setting up the misrepresentations as a defense to an action to enforce the contract.

Appeal from District Court of Lake County.

THE complaint upon which the cause was tried was the original complaint, to which a general demurrer was filed, defendants, Hugh Butler and Charles W. Wright, alleging that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was sustained. The case was brought to this court on error, where the judgment of the court below was reversed, and the cause remanded for further proceedings. *Linn v. Butler*, 8 Colo. 355.

The portions of the complaint necessary to an understanding of the case are as follows:

“(1) That on the 24th day of May, A. D. 1879, the plaintiff, William P. Linn, was the owner of, and in possession of, an equal undivided one-fourth ($\frac{1}{4}$) interest in and to the American mine, lode, ledge, or deposit, situated in California mining district, Lake county, Colorado. * * *

“(2) That upon the day and year last aforesaid said Linn sold his right, title and interest in and to said American mine to the defendants for the sum of five thousand seven hundred and fifty dollars (\$5,750), which sale was evidenced by the following agreement in writing, in words and figures following, and is made a part of the complaint, to wit: ‘This agreement, in duplicate, made and entered into this 24th day of May, A. D. 1879, by and between W. P. Linn, party of the first part, and Hugh Butler and C. W. Wright, parties of the second part. Whereas, on the day of the date hereof said second

parties purchased of and from said Linn his right and title in and to the American mine for the sum of five thousand seven hundred and fifty dollars (\$5,750), payable in instalments, that is to say, two hundred and fifty dollars (\$250) which has already been paid, receipt whereof is hereby confessed; two hundred and fifty dollars (\$250) in thirty (30) days next after the date hereof; two hundred and fifty dollars (\$250) in sixty days next after the date hereof; and the remaining five thousand dollars (\$5,000) out of the net proceeds of said mine, as hereinafter specified. Whereas, in pursuance of said agreement, said Linn hath on this day, in due form, conveyed unto said second parties said interest in said mine: Now, therefore, this agreement witnesseth, that for and in consideration of the premises it is mutually agreed by and between said parties that this agreement shall not be assignable or negotiable, and that the sums of money herein agreed to be paid shall be due and payable to the said Linn, and only to him, and to none other. And it is further agreed on the part of said second parties that they will at the end of thirty (30) days next after the date hereof pay unto said Linn said sum of two hundred and fifty dollars (\$250), and in thirty (30) days next thereafter a like sum, and that they will also pay unto said Linn the remaining instalment of five thousand dollars (\$5,000), it being well understood, however, that said payment of five thousand dollars (\$5,000) shall only be due and payable upon the terms and conditions herein, that is to say, that said latter sum shall be due and payable only out of the net proceeds received from the sale of ore taken from the said American mine by said second parties, such net proceeds to be the net proceeds aforesaid of the undivided one-fourth interest of said mine, that being the interest conveyed by said Linn to said second parties. And it is hereby further agreed and fully understood that the net proceeds above specified shall be construed only to mean the money received by said second

parties from the sale of ores mined and taken from said mine by them on account of said one-fourth interest, and left remaining in hand after paying all expenses of such mining, as well, also, all moneys advanced by said second parties, or paid out by them, for and on account of said undivided one-fourth interest, including the seven hundred and fifty dollars (\$750) paid on account of the purchase of said one-fourth interest; and, in case of sale by said second parties of said interest, then, and in that event, said five thousand dollars (\$5,000) shall at once become due and payable. In witness whereof said parties have hereunto set their hand on this, the day and year first hereinabove written. HUGH BUTLER. C. W. WRIGHT. WM. P. LINN.'

"(3) And afterwards, and on the 5th day of April last past, said Linn, for a good and valuable consideration, assigned in writing, to Charles F. Burrell, his right, title and interest in and to the foregoing agreement, as security for the loan of twenty-seven hundred dollars (\$2,700) before then made by said Linn from said Burrell, which assignment was made with the knowledge and consent of said defendants. And afterwards, and on the 29th day of October last past, said Charles F. Burrell, for a good and valuable consideration, assigned and set over in writing all his right, title and interest in and to said contract to Lewis C. Rockwell, who now holds said contract as collateral security for money theretofore loaned by him to said William P. Linn."

On the 5th of December, 1885, the defendants moved the court to dismiss the cause for the reason, "because it appears from the suggestion of the plaintiff of record in this cause that William P. Linn, the former co-plaintiff of said Rockwell, has, since the institution of the suit, departed this life, and because the action does not accrue to or survive in the said plaintiff Lewis C. Rockwell," which motion was argued, and on March 12, 1886, was overruled by the court. On the same date, defend-

ants filed a demurrer to the complaint, which was likewise overruled. On the 14th of April following they filed their answer to the complaint. On April 30th the plaintiff, L. C. Rockwell, filed a motion that David A. Gage and Nathan S. Hurd, executors of Linn, deceased, be made co-plaintiffs with him in the case, assigning that the reasons or grounds of said motion were: "*First*, because defendants, by motion and in the answer, insist that plaintiff is not the real party in interest in this case; *second*, because defendants insist the contract sued on was not assignable by Linn, and hence L. C. Rockwell has no right to receive the money due thereon." Which motion was supported by the affidavit of L. C. Rockwell, and was argued by counsel, and taken under advisement by the court. On the same day plaintiff filed a demurrer to the answer of defendants. On the 25th of June Nathan S. Hurd filed a petition asking that David A. Gage and himself, executors, be made co-plaintiffs with Rockwell. On the 23d of November following, by consent of counsel, an order was made that counsel, respectively, submit briefs in regard to the making of the executors co-plaintiffs on or before December 15th. On January 10, 1887, an order was entered making the executors parties, to which defendants excepted; and they were required by the court to prepare and tender a bill of exceptions within sixty days.

In the first paragraph of the answer, defendants admit the making of the contract as alleged in the complaint. The second paragraph is as follows: "They deny that said contract was assigned to the said Charles F. Burrell with the knowledge and consent of said defendants, and they deny that they ever assented to the assignment of said contract either to the said Burrell or to the said Rockwell." It is also averred that at some time thereafter, which date is not given, Moffatt and others began to sink a shaft on a small strip of unoccupied land near the line of the American claim, and discovered mineral

in such shaft before any was discovered in the American mine, and that the vein or ledge found by Moffatt and others was the same as that alleged by Linn to have been found in the American claim previous to the sale; that defendants immediately informed Linn of the finding of the ore by Moffatt and others, and of the fact that the shaft of the American mine had not been sunk to mineral, and he again asserted that the ore had been found in the American mine before the other shaft had been commenced; that after having found the mineral or ore in the shaft, and fully complying with the law, Moffatt and others made application for a patent from the United States government to the ground under the name of "The Little Sliver," and that the application so made embraced a large part of the ground claimed as the American claim; that defendants, by the advice and at the request of Linn, joined the other owners of the American claim, and filed an adverse claim in the United States land-office against the application of Moffatt and others for a patent to the Little Sliver mine, and, within the time prescribed by law, brought suit in the district court for Lake county in support of said adverse claim; that, in preparing for the trial of the case, defendants learned that the representations made by Linn, that mineral in place had been found in the shaft on the American mine, were false; and that mineral in place had been first found on the Little Sliver claim, and that the location of the American mine was invalid.

In the ninth paragraph defendants aver, in effect, that they stated all the facts to Linn, and that he advised defendants to make a compromise with the claimants of the Little Sliver lode, and stated to and agreed with defendants that any compromise that they might make would be satisfactory to him, and that he would change and modify the existing contract so as to relieve the defendants from its expressed terms. And in the tenth paragraph it is averred that, after making the compro-

mise and consolidation of the two conflicting claims, defendants immediately and fully informed Linn of the said settlement and transaction, and that he assented to and ratified the same, and that it was agreed that the contract existing should be so modified that the interest of defendants in the consolidated property should be substituted for the payment of the money in place of the property sold by Linn to defendants.

The fourteenth and part of the fifteenth paragraphs of the answer are as follows: "Said defendants further aver that it was stipulated by and between the said Linn and these defendants in said original contract, as well as in said supplemental contract, assenting to the settlement, adjustment and compromise as aforesaid, that all the rights, benefits and privileges of the said Linn, and the right to demand and receive any and all moneys that might come to him under said contract, should not be assignable, and that the same should be payable to the said Linn only, and that the same was a joint, and not a several, contract on the part of these defendants; and they aver that they have never agreed or consented to any assignment of said contract, or any part thereof, or any interest therein, either to the said Burrell or to the said Rockwell; and they deny that the said Rockwell is now the owner of said contract, or any part thereof, or any interest therein; and they deny his right to maintain this suit against them. (15) And defendants further aver, upon information and belief, that the supposed assignment of said contract to said plaintiff was only for the purpose of securing the payment to said Rockwell of certain debts and claims held by said Rockwell against said Linn; and they further aver, upon information and belief, that the said debts and claims have been fully paid and satisfied." * * * In the seventeenth paragraph, it is in substance averred that the plaintiff Linn died pending the decision of the writ of error in this court; that no application was made by the executors to become

parties to the same; that, after the cause was remanded, Rockwell, with the knowledge and consent of the executors, applied to be and was made sole plaintiff; and that for those reasons the suit was discontinued as to them, and that they had no right to prosecute and maintain this suit against the defendants.

Plaintiffs replied to the answer at great length, traversing and denying all the material averments in the answer. Trial was had in the latter part of December, 1887, resulting in a judgment in favor of plaintiffs for the sum of \$9,008.33.

Messrs. HUGH BUTLER and T. D. W. YONLEY, for appellants.

Messrs. L. C. ROCKWELL and CLINT. REED, for appellees.

REED, C. There are in this case forty-three errors assigned upon the record; but a large part of them, if not the majority, arise out of, and are ancillary to, one important question, viz., who were the proper parties, or who was the proper party, to prosecute the suit?

In instituting the suit, William P. Linn was made a plaintiff with L. C. Rockwell, and so remained, without a challenge or objection, so far as is disclosed by the record of the proceedings had in the district court in the first instance. It is true that the only adjudication in that court was upon a general demurrer to the complaint; but, under our code of practice, the objection that the plaintiff had no legal capacity to sue, or that there was a defect or misjoinder of parties plaintiff or defendant, could have been made and determined upon demurrer. Code, § 55, p. 18. This was not done. The question in regard to Linn's being a proper party does not appear to have been raised until after the disposition of the case in this court on writ of error, and the death of Linn. Upon its being remanded for further proceedings, the question

first arose on motion to substitute the executors in the place of the deceased plaintiff. So far, defendants must be held to have acquiesced, if not in the necessity of Linn's being a plaintiff, at least in the propriety of it. No argument or authorities are necessary to show that if Linn was a proper party his executors should have succeeded him. But defendants are not concluded by this apparent acquiescence and failure to raise the question in regard to Linn. The motion to substitute the executors was resisted, and the correctness of the decision of the court was questioned, and the question raised by the answer. An exception was taken to the order of the court making the executors plaintiffs, and sixty days given in which to tender the bill of exceptions. None appears to have been tendered. This should have been done, as the order was not one of those enumerated in the code, where a bill of exceptions was unnecessary. But this failure, probably, will not relieve the court from the necessity of an examination; for, as above stated, the same question is raised by the answer.

But there arises a difficulty; for it is averred that Rockwell was improperly a plaintiff, having no legal interest. The same proposition had been presented to the court by motion, and had, after argument, been overruled. In a subsequent paragraph it was averred that the executors were not properly plaintiffs; that the failure to be substituted in time, and the application of Rockwell to be allowed to prosecute as sole plaintiff, and the order of the court allowing it, worked a *retraxit* or a discontinuance on the part of the executors,—defendants claiming, in effect, by their answer, that the cause could not proceed at all. Such a position was clearly untenable,—certainly anomalous,—and an attempt to abate the suit first as to one plaintiff, then as to the other, piecemeal. At common law the pleader was required, in a plea in abatement, not only to show that the parties were not the proper ones, but to show who were; in the language

of the books, "to give a better writ." Here the attempt was, in effect, to bar the suit by matter in abatement, which could hardly be done even under our Civil Code. Ordinarily, under our practice, the question of too many plaintiffs or defendants is one of no great importance, except in the matter of costs. It can be disposed of at the close of the trial in accordance with the established facts. But in this case it became important on account of the character of some of the plaintiffs as executors, placing defendants under a disability in the way of proof or evidence of their defense.

The contract executed between Linn and defendants had been assigned to Burrell, and by Burrell to Rockwell. Whether it could have been by its own terms legally assigned will be discussed hereafter. It was a question that could only be determined upon the trial. Having been assigned for an unquestioned valuable consideration, he had, unquestionably, such an interest in the subject-matter of the controversy as would make him a proper party, if not an indispensable one, regardless of the character of the assignment, as to whether it was absolute, so as to pass the title, or qualified, as being assigned as collateral security. But, as to the executors, the determination of the question as to the character of the assignment becomes important, in fact determines the question of the right to become parties.

In the third paragraph of the complaint it is alleged that Linn assigned to Burrell his right, title and interest in and to the agreement as security for the loan of \$2,700, etc.; that Burrell afterwards assigned his right, title and interest to said contract to Rockwell, "who now holds said contract as collateral security for money theretofore loaned by him to said William P. Linn." In the fifteenth paragraph of the answer it is said: "And defendants further aver, upon information and belief, that the supposed assignment of said contract to said plaintiff was only for the purpose of securing the pay-

ment to said Rockwell of certain debts and claims against said Linn," etc. That the contract was assigned by both Linn and Burrell, and that Rockwell took and held it as collateral security, is shown by the testimony of Rockwell. It is nowhere shown or claimed that the assignment was absolute, so as to pass the title and invest the holder with the ownership. It was in both instances assigned as security for the payment of a loan of a trifle more than one-half its face.

In all transactions of this kind the ultimate object of the inquiry is, what was the understanding and intention of the parties? And when ascertained such intention must control. Where the transaction imports nothing more than giving a security, without a sale or change of title to the property, the law makes it a pledge. In Jones on Pledges and Collateral Securities, § 17, it is said: "An assignment of securities by a debtor to his creditor is presumed to be as collateral security, and not in payment of the debt, in the absence of evidence tending to show an intention that the securities should be applied in satisfaction of the debt, in whole or in part." In section 15: "A bill of sale, absolute in terms, * * * intended only as collateral security, is a pledge, if accompanied by a delivery of the property to the creditor." See *Walker v. Staples*, 5 Allen, 34; *Whitaker v. Sumner*, 20 Pick. 399. "That the assignment is absolute in form is of no consequence as regards the question of intention." Jones, Pledges, § 17. A transfer, absolute upon its face, "may be shown by parol evidence to have been executed by way of security, and therefore to be a pledge." Id. § 15; *Eastman v. Avery*, 23 Me. 248; *Shaw v. Wilshire*, 65 Me. 485. See, also, in equity, *Morgan v. Dod*, 3 Colo. 551.

The fact stated by Rockwell, that he afterwards advanced a larger sum of money, and was the real party in interest, is unimportant in determining the character of the transaction, so long as it is shown that the nature

of the transaction was not changed by a new contract, and the absolute title vested in the assignee. Not only does the evidence establish the fact of a pledge as security, but, aside from that, when the question as to whether it was a sale or a pledge is raised, unless the debtor shows by positive evidence that it was intended to be a sale, the inference of law is positive that it was transferred only as collateral security. *Leas v. James*, 10 Serg. & R. 307; *Perit v. Pittfield*, 5 Rawle, 166; *Jones v. Johnson*, 3 Watts & S. 276.

Collateral security is defined by Bouvier as "a separate obligation attached to another contract to guaranty its performance;" by Webster, as "security for the performance of covenants, or the payment of money, besides the principal security;" by Worcester, as "security for the fulfillment of a contract or a pecuniary obligation in addition to the principal security." In *Halliday v. Holgate*, L. R. 3 Exch. 299, it was said by Mr. Justice Willes: "There are three kinds of security: The *first* is simple lien; the *second*, a mortgage passing a property out and out; the *third*, a security intermediate between a lien and a mortgage, viz., a pledge where, by contract, a deposit of goods is made a security for a debt, and the right to the property vests in the pledgee so far as it is necessary to secure the debt."

In all cases of a pledge as collateral security, the general property remains in the debtor. The creditor has only a special property,—a lien,—a right to retain his security until the payment of the debt. When the debt is paid the security reverts. If default is made the assignee can proceed to dispose of the security, discharge his own debt, and the balance, if any, goes to the assignor or debtor. *Jones*, Chat. Mortg. § 4; *Jones v. Baldwin*, 12 Pick. 315; *Robertson v. Wilcox*, 36 Conn. 426; *Conner v. Carpenter*, 28 Vt. 237; *Trust Co. v. Rigdon*, 93 Ill. 458. It follows that the transaction, in the first instance, having been one of pledge as collateral security, and

never having been changed by subsequent contract, and no default having been made, and the property of Linn extinguished by sale, he and his estate remained the owner of the contract assigned, subject to the lien of Rockwell; and the special property of Rockwell could have been at any time, by becoming due, or by consent of parties, extinguished by payment of the amount for which it was held; and that Linn was a proper party during his life, and, having been such, his executors were proper parties after his death. See Gen. St. p. 1058, ch. 115, § 155.

We do not intend to be understood as saying that either Linn or his executors were absolutely indispensable parties, and that Rockwell could not have prosecuted as sole plaintiff, but that Linn, and after him his executors, had a legal right to be parties at their own election. They could not be precluded at the option of defendants, nor could their right to be parties be extinguished by the act of Rockwell in asking to be made sole plaintiff, and the action of the court in making him so. The ultimate effect of making the executors plaintiffs may have been disastrous to defendants, by placing them under a disability in establishing a defense. They were unfortunate in not being able to make their proof by evidence aside from their own; but this grew out of a rule of evidence, not out of the fact of the executors having been made parties. Although such was the result of their having been made parties, it could in no wise affect or determine their right to be such and to prosecute the suit.

This, in effect, disposes of the question raised in regard to the assignment of the contract by Linn; defendants contending that by its terms it prevented any legal transfer, and that Rockwell took nothing by it. The legal effect of the provision in the contract that it should not be assigned must be construed to be that the title to the chose in action should not pass to another so as to prevent defendants from asserting any equity or defense

that might arise between the original parties. In the language of the contract, the object was to prevent its negotiability. This contract was not violated by a pledge as collateral security. The assignees, having only a lien or special property, held it subject to all the existing equities. Such is always the rule in regard to choses in action held as collateral, unless they are negotiable upon their face, and are taken out of the rule by the operation of the law-merchant. If this is not conclusive of the question, there was evidence, although contradictory, from which the jury might have found, as they evidently did find, that defendants consented to the transfer. Section 1, chapter 116, General Statutes, is as follows: "That no party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, by virtue of the foregoing section, when any adverse party sues or defends * * * as the executor or administrator, heir, legatee or devisee of any deceased person, * * * unless when called as a witness by such adverse party so suing or defending, and also except in the following cases, namely."

The evidence offered by defendants, and excluded by the court, was not taken out of the general rule by any exceptions to it. After a careful examination of the testimony offered and excluded, we cannot say that the court erred, or extended the rule beyond its proper limits; and the rule is a just and salutary one. Finding that the executors were properly made parties, and the only evidence offered in support of many of the averments in the answer was that of the defendants, which was properly excluded, disposes of many of the supposed errors. The defense of misrepresentations on the part of Linn in regard to title, rights, and development of the property sold, to induce the purchase, was untenable — *First*, from the character of the conveyance made by Linn; *second*, from the conduct of defendants after the purchase, which resulted, in law, in affirmance and ratification.

When defendants went into the possession and occupation of the property, and found they had been deceived by the statements of Linn, they could have either rescinded at once, or affirmed and brought an action in the nature of an action on the case at common law, for damages for the deceit, and recouped or set off such damages against their own obligation to pay. Neither was done. Having entered into the occupation of the property, and proceeded to exercise rights of ownership, and to deal with it as their own, they were estopped and precluded from asserting the defenses set up, except by establishing by evidence the modification of the contract as alleged, which, in effect, would have been the abrogation of the old contract entirely, and the substitution of a new and different one. Such alleged contract not having been reduced to writing, and defendants having no evidence but their own to establish it, and that being inadmissible, the several defenses failed as against Linn's executors. As to Rockwell, there was evidence before the jury sufficient to warrant it in saying that defendants, failing to notify Burrell and Rockwell of their supposed defenses against Linn when applied to for information, were estopped by their own conduct.

The other and remaining errors assigned were predicated upon the supposed fact that the executors were erroneously made parties, and defendants erroneously precluded from making the proof of the alleged new contract, and hence are disposed of in our view of the case. The defendants having failed to establish their defense by competent testimony, in fact having been prevented from putting in any testimony by reason of its character to support the averments in the answer, the court below was warranted in finding that the matters relied upon had been considered and determined by this court on error in the former case, and were *res adjudicata*, and in so regarding and treating them. Although, as before stated, the defendants, by the course pursued, and the

rulings of the court, had been placed at a disadvantage, yet this resulted not from the erroneous acts or rulings of the court, but was the unfortunate result of failing to procure competent evidence; a result quite frequent in the history of judicial proceedings. The judgment should be affirmed.

PATTISON, C., concurs. RICHMOND, C., dissents.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

Affirmed.

14	140
14	809
14	140
21	118
21	289
7a	90
14	140
26	471

BATES ET AL. v. ALFRED H. AND RANDALL W. WILSON,
AND THE WOODMAS OF ALSTON MINING CO.

1. A JOINT CONTRACT MAY EXIST FOR THE PURCHASE OF REAL ESTATE, BY VIRTUE OF WHICH A BENEFICIAL INTEREST WILL VEST IN ALL THE CONTRACTING PARTIES ON THE PURCHASE THEREOF, REGARDLESS OF PERFORMANCE ON THE PART OF EACH.—Three persons entered into a joint agreement to acquire title to certain unpatented lode mining claims, by the terms of which two of them, brothers, were to purchase of the holders thereof the possessory rights and titles by virtue of which they were held, and the third party was, at his expense, to perfect these titles, by foreclosure, and purchase thereof at the foreclosure sale, of a trust deed thereon, and by procuring United States patents for all the claims. All titles were to be taken in the names of the two brothers, to be held by them for the joint benefit of the three, and all expenditures were to be reimbursed to the parties out of the proceeds to be realized from working the property, first the two brothers the amount expended in purchase of the possessory titles, and then the third party the amount which he expended in perfecting the titles, after which the property was to be held and operated for the joint interest and benefit of all three parties. *Held*, that on purchase by the two brothers of the possessory titles a beneficial interest vested in the third party, the performance of the contract by him not being a condition precedent to his acquiring such interest.
2. TRUST ESTATE AND ADJUSTMENT OF THE RIGHTS OF THE BENEFICIARIES.—A purchase under such an agreement charges the property with a trust in favor of the third party which cannot be

arbitrarily discharged, but only by proceedings involving an accounting, settlement and adjustment of his rights in accordance with the terms of the contract.

3. WHAT IS SUFFICIENT TO CONSTITUTE A CORPORATION DE JURE.—A certificate of incorporation which provides that the corporate affairs shall be controlled by its president, vice-president and attorney, instead of providing for a board of directors or trustees, as required by General Statutes 1883, section 288, is insufficient to create a corporation *de jure*.
4. WHO IS ESTOPPED TO DENY DE FACTO EXISTENCE OF A CORPORATION DE JURE.—One who has signed such certificate, has conveyed property to the company, and has acted as one of its officers, is estopped from denying its *de facto* existence.
5. CERTIFICATE OF INCORPORATION — CONSTRUCTION OF AMBIGUOUS LANGUAGE.—Where three owners of mining property, each owning an undivided one-third interest, organize a corporation, and convey to it the said property in payment for all its stock, which, by the certificate of incorporation signed by the three, is to be "divided half and half between the parties," each incorporator is entitled to one-third of the capital stock.

Appeal from District Court of El Paso County.

Mr. L. C. ROCKWELL, for appellants.

Mr. HUGH BUTLER, for appellees.

PATTISON, C. The judgment appealed from in this case was rendered June 26, 1886. It was found by the court that "the equity of this case is not with the said plaintiffs, but is with the said defendants." There was no other finding. The decree, dismissing the bill, was predicated upon this finding alone. To determine the appeal, therefore, a review of all the evidence is necessary. The trial having been had entirely upon *depositions*, it is the duty of the court, not only to sift and weigh the testimony, but to consider the whole case, not only upon the law, but upon the facts as well. *Jackson v. Allen*, 4 Colo. 263; *Miller v. Taylor*, 6 Colo. 41; *Sieber v. Frink*, 7 Colo. 148; *Bank v. Newton*, 13 Colo. 245.

There is a conflict of evidence upon all, or nearly all, the issues in the case. A discussion of the testimony in

detail is impracticable. The entire record, however, has been rigidly examined, and the conclusions reached are the result of careful investigation and analysis.

The evidence tends to show that prior to November 1, 1884, George R. Gwynn and James Moynahan claimed to be the owners of eight certain lode mining claims, situate in the county of Park, which had been theretofore the property of the Great West Mining Company. The interest of Gwynn was an undivided two-thirds, and that of Moynahan an undivided one-third. They derived their title from sheriffs' deeds, issued to them as purchasers at execution sales, upon judgments recovered against the Great West Mining Company. No part of the property had been patented. The validity of the title was doubted, on account of the irregularities in the judgments.

The property was subject to a trust-deed, which had been made by the Great West Mining Company in April, 1882, to secure the payment of a promissory note given to one Duncan McBride, for the sum of \$3,000, with interest at the rate of one and one-half per cent. per month. Two thousand dollars had been paid upon the note. The mining company was insolvent and could make no further payment. Prior to the month of October, 1884, this note and trust-deed had been placed in the hands of George C. Bates, one of the original plaintiffs in this case, for collection. Gwynn, through Bates, as the attorney for McBride, had agreed to purchase the note, and had employed him to institute suit in the federal court to foreclose the trust-deed. The purpose of the foreclosure was to perfect the title to the property.

In October Gwynn decided to sell the property. He claimed to represent his own interest and also that of Moynahan. He authorized Bates to negotiate a sale. The price and terms do not appear to have been definitely settled when the authority was given. Gwynn proposed to sell the entire property and any interest which he had

acquired in the McBride trust-deed and note by his arrangement with Bates. Pursuant to this authority, Bates, prior to November 1, 1884, brought the property to the attention of the defendants Alfred H. and Randall W. Wilson. They were engaged in business as grocers in this city. They became interested, and during November Alfred H. Wilson went to Park county to examine the property. After the examination they decided to take the property, if it could be purchased at a reasonable price. Before the purchase was made, negotiations were had between Bates and the defendants, for the purpose of making some arrangement or agreement under which Bates might also acquire some interest in the property. These negotiations resulted in a parol contract, by the terms of which Bates undertook to negotiate the purchase of the property upon the best terms possible. He also undertook to prosecute the suit brought to foreclose the McBride trust-deed to final judgment, at his own expense. He further agreed to pay the amount of the judgment and to purchase the property for the benefit of the parties at the sale to be had under the decree. He also agreed to apply for and obtain patents to the entire property at his own expense. He also undertook to render such legal services as might be required in the defense of the title, and to protect the interests of the parties. The Wilsons agreed that they would advance the money to pay for the property. It was further mutually agreed that, if the purchase should be made pursuant to the agreement, the title should be taken in the name of the defendants Alfred H. and Randall W. Wilson, to be held by them for the joint interest and benefit of the three; that from the proceeds of the property the amount advanced by the defendants to purchase the property should first be paid; the amount paid by Bates to perfect the title under the decree of foreclosure was next to be paid; the expenses incurred by him in obtaining the patents and reasonable compensation for

legal services should then be allowed; and thereafter the property should be worked for the joint interest and benefit of the three parties. After this arrangement was made, Bates transferred to his wife, Mary Barker Bates, one-half of the interest which he expected to acquire.

The negotiations for the property with Gwynn were had pursuant to this agreement. A contract for the purchase of his interest was made on or about the 5th day of December, 1884. Prior to that time, Moynahan had denied Gwynn's authority to represent him, and negotiations were had with him independently. By the terms of the contract with Gwynn the parties agreed to pay the sum of \$6,194 for his interest in the property, and his right to purchase the McBride trust-deed; \$2,000 of this sum was paid in cash, and the balance was to be paid forty-five days thereafter. Gwynn thereupon executed a deed conveying his interest in the property, which was placed in escrow in the First National Bank of Denver, to be delivered to Alfred H. Wilson and Randall W. Wilson upon the payment of the sum of \$4,194, the balance of the purchase price. The interest of Moynahan was purchased on December 6, 1884, for the sum of \$2,000. Five hundred dollars of this sum was to be paid on December 16, 1884; \$1,000 on January 16, 1885; and the balance of \$500 on February 3, 1885. Moynahan duly executed a deed to his interest upon December 6, 1884, which deed was placed in escrow in the Colorado National Bank, and there remained until the several sums mentioned were paid, when it was delivered to Alfred H. and Randall W. Wilson.

At the time this purchase was made the property was in the possession of a lessee. The lease was to expire at noon on December 8th. Gwynn agreed to deliver possession of the property to the Wilsons immediately upon the expiration of the lease, and entered into a contract with them to work the mines until they could take charge of the business themselves. By the terms of this agree-

ment he was to receive \$5 per day for his services, and to account for the entire proceeds of the property. By these transactions the Wilsons acquired the legal title to the premises in question, and became entitled to the possession of the property on December 8, 1884.

December 8, 1884, Gwynn took possession of the property as the representative of the defendants. The mines were then very productive. Gwynn violated his contract in every particular. He began to work the property, but failed to account for the proceeds, and failed to keep the Wilsons advised of his operations. Early in January, 1885, Bates went east, and did not return until about the 1st of March. The balance of the purchase price was due to Gwynn on or about the 14th of January, 1885. Before that day arrived the Wilsons, believing that Gwynn, in violation of his contract, had taken from the property more than sufficient money to pay this balance, and in order to get time to investigate, obtained from Gwynn an extension of the time to March 3, 1885. The balance due to Moynahan was paid in accordance with the terms of the agreement with him. Bates being absent, nothing was done by the Wilsons to protect their rights as against Gwynn until his return. In the interval Gwynn actually realized from the property more than \$20,000. When Bates returned, he determined to commence suit against Gwynn at once to recover this money. As a first step, however, it was thought necessary to obtain the deed, which was still in the First National Bank in escrow. A bill was filed in the district court of Arapahoe county, and an injunction obtained restraining Gwynn from working the property, and also enjoining the First National Bank from paying over to Gwynn the amount of money which was then deposited, for the purpose of obtaining possession of the deed. Gwynn appeared and answered the complaint, setting up as defenses that, by the failure of the Wilsons to pay the purchase price in accordance with the terms of the con-

tract, they had forfeited their interest in the property, and that the subsequent payment to the bank was not a good payment, because the bank was enjoined from paying the money over to him. This suit was settled by the practical surrender to Gwynn of all that he claimed.

Defendants insist that Bates was guilty of a violation of his agreement to defend the title to the property, and protect the interest of the Wilsons, because the compromise was made upon the unjust terms demanded by Gwynn. It is clear, however, from the evidence, that the Wilsons settled with full knowledge of their rights, believing that it would be best to obtain possession of the mine upon any terms rather than enter into protracted litigation. By the settlement they received one-third of the net proceeds which Gwynn realized from the mines; it being conceded that the one-third belonged to them, as owners of the Moynahan interest. This amounted to about \$3,500. After this settlement, the parties acquired undisputed possession of the property, and immediately began the prosecution of the enterprise under their contract. Bates began to take the necessary steps to obtain patents for the property. He also continued the prosecution of the suit in equity brought to foreclose the McBride trust-deed.

Prior to April 1, 1885, after some discussion, the parties agreed to organize a body corporate for the purpose of conducting their common business. On or about April 7, 1885, a certificate of incorporation was prepared by Bates, which was executed by him and by the Wilsons upon that day. On account of the importance of this instrument as evidence, and the effect which it is claimed to have upon the rights of the parties, the material parts of the certificate are here stated in full: "*First*. The corporate name of said company is The Woodmas of Alston Mining Company. *Second*. The object of such corporation is the working, operating, buying and selling ore, and leasing mines of gold and silver, in Park and other counties, in

Colorado; buying, selling and smelting ore in all parts of Colorado; and doing a general mining business in said state. *Third.* The capital stock is \$500,000, divided into fifty thousand shares, of \$10 for each share, divided half and half between the parties. *Fourth.* The company shall exist for fifty years. *Fifth.* That the affairs and management of said corporation are to be under the control of Alfred H. Wilson, president, financial agent and treasurer; Randall W. Wilson, vice-president; and George C. Bates, attorney, secretary and accountant,— who are selected to act as such officers to manage the affairs and concerns of such corporation until May 1, 1886. *Sixth.* The operations of said corporation to be carried on in Park county. The principal place and business office is located at Alma, with a branch office in Denver. *Seventh.* The president, vice-president and attorney have power to make by-laws as they deem proper, and no stock shall be issued or delivered except by their joint action in writing.” This certificate was duly executed, acknowledged, and filed in the office of the secretary of state, and a copy thereof in the office of the clerk and recorder of Park county. Upon the following day a deed was made and executed by the Wilsons, conveying to the body corporate the entire property acquired from Gwynn and Moynahan. The consideration expressed in the deed is \$500,000. This sum represented the entire capital stock of the company. This deed was duly recorded. At the time the deed was made the corporation had not been organized.

After filing the certificate, and until the bringing of this suit, the business of these parties seems to have been conducted in the name of this corporation, to wit, The Woodmas of Alston Mining Company.

Bates spent a considerable portion of his time at Alma in the business of the company. He continued to take the steps deemed to be necessary by him to obtain patents for the property. It appears, however, that at about

this time the parties decided not to apply for patents until after the sale under the trust-deed. The mines were worked with varying success. Mary Barker Bates was recognized by the Wilsons as a party in interest. Bates appears to have taken several hundred dollars with the consent of the defendants.

In May, 1885, Bates obtained a decree of foreclosure of the McBride trust-deed. By this decree it was adjudged that there was due to McBride the sum of \$1,916, and it was further adjudged that, if the defendant, the Great West Mining Company, should fail to pay this sum and costs of suit within thirty days from the date of decree, then the property should be sold. Under this decree the property was advertised to be sold at Alma upon the 15th day of August, 1885. William M. Burns, sheriff of that county, was appointed a special master in chancery to make the sale. The defendant Alfred H. Wilson and George C. Bates attended the sale. Prior to that time, no serious controversy appears to have arisen between the parties. It had been claimed by defendants that they had been misled in executing the articles of incorporation, with the clause therein declaring that the stock should be "divided half and half between the parties." They contended that Bates was to receive but one-third of the capital stock, and that his right to any interest therein was entirely dependent upon his performance of the contract entered into at the time the original purchase was made. It appears, however, that this controversy did not seriously interfere with the relations of the parties, and that they continued their operations together, the same after as before the misunderstanding arose. Upon the day of the sale Bates did not have the money to pay the amount of the decree. He therefore proposed to Wilson to bid for the property the amount found due by the court, in the name of his client Duncan McBride. His purpose seems to have been to bid in the property, and afterwards secure the certificate of pur-

chase from McBride, before the time to redeem had expired, for the benefit of the company. He claimed that, under his arrangement with McBride, he could control the certificate. Wilson objected to this course. He proposed to buy the property individually. Bates would not consent. Finally it was agreed that Wilson should bid as president of the Woodmas of Alston Mining Company, and buy the property for the company.

Before the sale took place it had been arranged between Wilson and the special master that the money should be paid to him some day thereafter. The sale was made and the property was sold to the corporation for the sum of \$2,300. After the sale, Wilson demanded that Bates should provide the money to pay for the property, as he had agreed to do under the contract. This he would not or could not do. Wilson refused afterwards to pay his bid. In his testimony he states, as a reason for his refusal, that he had become satisfied that the trust-deed had been paid; that nothing was due thereon; and that he desired an opportunity to investigate. After this attempted sale, the parties continued the business of working the mines as before. A resale was ordered, which was advertised to take place upon October 16th. Bates and defendant Alfred H. Wilson, accompanied by counsel, attended the second sale. Bates again proposed to bid off the property for the amount of the decree, in the name of his client McBride. To this Wilson strenuously objected, and a serious controversy arose between the parties. They were not able to agree as to the manner of conducting the sale. When the property was offered by the special master, Wilson bid for the property the sum of \$2,600. He then demanded that the master should immediately deliver to him a certificate of sale. The master declined to do this until the money had been paid to him, assigning, as a reason, that Wilson had failed to complete his bid and pay the money at the first sale. As a result of this controversy, Wil-

son was permitted to withdraw his bid, and made a second bid, which was also withdrawn, because the master again refused to deliver the certificate until he had received the money. The property was again offered for sale, and was bid off by Wilson individually, and the money paid over. Bates violently objected to this course, and threatened to have the sale set aside, but upon what grounds it does not appear. Wilson was permitted to withdraw his money, and the property was thereupon again offered. Bates bid the amount of the decree in the name of McBride, and received the certificate of sale. This certificate was forwarded by Bates to his client. Whether any arrangement was made by him to pay to McBride the amount due him, and take the certificate before the time for redemption should expire, does not clearly appear.

Prior to the sale, a serious controversy had arisen between the parties. The defendants first insisted that the complainant Mary Barker Bates had no interest in the property, either as a stockholder or otherwise. They also claimed that Bates was without a present interest in the property, for the reason that his interest was conditional, and could not vest until he had performed his contract, obtained patents for the property, and provided for the payment of the McBride trust-deed. It appears that, at or about the time of the sale, the defendants had refused to permit Bates, or any one representing him, to enter upon the premises. Thereupon, and on the 17th of October, 1885, this suit was begun.

The action was originally brought by the complainants, as the owners of one-half of the capital stock of the company. Their claim to relief was entirely predicated upon their relations to the corporation as stockholders. They alleged that they were the owners of one-half of the capital stock; that the defendants denied their interest, and interfered with the exercise of their rights. They prayed for an injunction, for the appointment of a

receiver, and for other relief. A writ of injunction was issued at the time the bill was filed, and afterwards, upon motion, Nathan S. Hurd was appointed receiver of the property. To the complaint a demurrer was first interposed, which was overruled, and, after the appointment of a receiver, the defendants answered.

By their answer, most, if not all, of the material allegations of the complaint were put in issue. As affirmative matter, it was averred that a contract had been entered into between the defendants and Bates substantially the same in its terms as the contract already recited, except that the interest which Bates was to acquire was an undivided one-third interest, and the further important exception that the performance of all of his covenants and agreements was a condition precedent to his obtaining any interest whatever in the property. There are many allegations which charge Bates with misrepresentation, misconduct, fraud and bad faith. As these allegations are not sustained by the evidence, they are not deemed material. All the material allegations of the answer were put in issue by the replication. The trial was had upon all the issues presented by the pleadings. A very large part of the testimony was taken prior to the 11th of February, 1886, upon which day George C. Bates died.

March 23d, by leave of court, an amended complaint was filed by Mary Barker Bates, as surviving plaintiff, in her own right, and as widow and only heir at law and executrix to the last will and testament of George C. Bates, deceased. In this complaint the contract alleged to have been entered into by George C. Bates in his lifetime is set forth in detail. It is also alleged that, pursuant to said contract, the plaintiff had caused to be prepared an application for patents upon the property, and presented the same to Alfred H. Wilson, as president of the corporation, with the request that he duly sign the same, but he refused so to do. It is further alleged that

the plaintiff was ready and able to carry out all the terms of the agreement, and ready and willing to pay the amount due McBride, and to obtain the certificate of sale for the use of the company; that the costs of the foreclosure and sale, amounting to \$190, had been duly paid.

June 14, 1886, a supplemental complaint was filed by leave of court, in which it is alleged, in substance, that since the filing of the amended complaint the plaintiff had purchased the McBride certificate of sale for the benefit of the defendant corporation. To this supplemental complaint the defendants answered that the said certificate had not been acquired by the said plaintiff, but by Lewis C. Rockwell, her attorney, for the purpose of harassing and oppressing the defendants, etc.

Upon the trial of these several issues it appeared that the plaintiff Mary Barker Bates had, through her attorney, Mr. Rockwell, entered into negotiations with McBride some time prior to April 14, 1886, the day upon which the right to redeem would expire, and that such certificate was actually received by Rockwell on the morning of April 14, 1886; that he then went directly to the residence of Alfred H. Wilson, to inform him that he had received the certificate; that Wilson was not at home, having left the city the night before to go to Park county for the purpose of finding Mr. Burns and redeeming the property from sale; that Wilson did pay to Burns the amount of the decree, judgment and costs; that the master thereafter paid the same into court. Before the conclusion of the trial the certificate was presented to and filed with the court as evidence of the performance of the original contract between the parties. At the time the decree was rendered the situation of the parties seems to have been about as follows: Mrs. Bates had caused the application for patent to be prepared and presented to the defendants to be signed by them as officers of the corporation, but they declined to sign the application. The certificate of purchase had been obtained from

McBride, the amount due him having been paid. The certificate was tendered to the court for the benefit of the parties in interest. The property, from the time the suit was begun until the decree was rendered, had been in the possession of and operated by the receiver. It appears that the net proceeds of the property during the receivership amounted to about the sum of \$19,400. By the terms of the decree the bill of complaint was dismissed, the receiver was directed to pay over to Alfred H. Wilson and Randall W. Wilson the sum of \$16,000, and to apply the balance to the payment of the costs and expense of the receivership. From this decree this appeal was taken.

In the application of equitable principles to the facts stated, it is necessary, first, to determine the nature of the contract entered into by George C. Bates and Alfred H. Wilson and Randall W. Wilson, and the relations and rights of the parties under that contract. The evidence tends irresistibly to establish the fact that the terms of the contract were settled and agreed upon before or at the time the negotiations with Gwynn and Moynahan, for the purchase of the property, began. The conditions upon which the parties were to join in the enterprise were clearly and well defined. The mutual promises which sustained and supported the agreement were clearly understood. The negotiations for the purchase were to be carried on by Bates. He undertook to acquire the title, vested in Gwynn and Moynahan, together with Gwynn's right to purchase the trust-deed, upon the best terms that could be secured. The Wilsons did not agree to purchase the property upon any terms, but upon terms which might be satisfactory to them. If Bates secured favorable propositions from Gwynn and Moynahan, then the Wilsons, if necessary, were to advance money sufficient to pay the entire purchase price of the property. Having secured the title of Gwynn and Moynahan, it was the duty of Bates, at his

own expense, to perfect that title by foreclosure and sale under the McBride trust-deed, and also to obtain letters patent from the United States.

When the property had been secured, the title was to be held by Alfred H. Wilson and Randall W. Wilson, for the benefit and mutual interest of all concerned. The relation which resulted was in the nature of a mining partnership. That it was so understood by the parties is clear from the evidence of all three, as to the reasons which induced them to form a corporation, to the effect that they sought to avoid liability as partners.

The contract being a valid one, and sustained by sufficient consideration, and having been entered into prior to the purchase, it necessarily follows that, when Gwynn and Moynahan conveyed their title to A. H. and R. W. Wilson, the property was acquired, charged with a trust of which the three parties to the precedent agreement were beneficiaries. The subject of the trust was the property in controversy. The terms of the trust were settled by the contract. The rights of the beneficiaries to participate in the proceeds of the mines were dependent upon the performance of their several undertakings. Before Bates could participate in the proceeds of the property, the defendants were entitled to receive the entire amount of money which they had advanced to pay the purchase price. When that sum had been realized by them, Bates was entitled to be reimbursed for the expenditure made by him in and about obtaining the patents and the satisfaction of the trust-deed. The performance of these undertakings, however, were none of them to be conditions precedent to the acquisition of an interest in the enterprise. If, by the operation of the mines, a sufficient amount was realized to pay the amount advanced by the Wilsons, as cash payments, and the balance of the purchase price as it became due, they were clearly entitled to make that application. If, after the payment of those sums, there remained sufficient of

the net proceeds to pay the expense of obtaining patents and the payment of the McBride trust-deed, then Bates became entitled to such proceeds. The interests of the parties, after the terms of the contract had been settled and agreed upon, and the property acquired pursuant thereto, were present, and not contingent, interests. The parties all became beneficiaries by virtue of the contract, as soon as the legal title was acquired. That this was the legal effect of the contract is manifest. That it was so understood by the parties is affirmed and emphasized by nearly every written communication which passed between them until the controversy arose which preceded this litigation. Performance of the several covenants and agreements made by them was not a condition precedent, but a condition subsequent, to the acquisition of an interest in the enterprise. It was a condition which did not affect the legal title of the parties, but their right to enjoy the equitable interest and benefits of the estate created by the contract. The agreement was not in the nature of a contract by the Wilsons to sell and convey to Bates an interest in the property. Bates acquired the interest as soon as the property was purchased pursuant to the contract. This suit is not in the nature of a suit for specific performance. On the contrary, it is a suit brought to restrain defendants from interfering with complainants in the enjoyment of the beneficial estate, the right to which sprang into being as soon as the property was acquired. If Bates was guilty of inequitable conduct, if the complainants failed to discharge the obligations imposed by the contract, the interest was not thereby forfeited. The defendants could not arbitrarily terminate the trust. This could be done only by suit, involving an accounting and the settlement and adjustment of the rights of the parties as beneficiaries, as defined by the terms of the contract itself. If it appeared that a reasonable time had elapsed, and that Bates had failed to perform his contract, or that he had been guilty

of conduct so fraudulent or inequitable as to warrant a forfeiture of his interest, then, by decree, the trust could be terminated, and, but for the conveyance to the corporation, the effect of which will be discussed hereafter, the defendant declared to be vested, not only with the legal title, but with the beneficial estate as well. It is clear that the parties proceeded, under the contract, from December to April, with a clear understanding of their mutual rights and duties.

The next question presented is the effect upon the rights of the parties, resulting from the attempt to organize a corporation. If a body corporate was in fact created, and if by the conveyance of the legal title to that body, which was made by the Wilsons, the corporation actually acquired the property, the effect of that transaction would be clear and unmistakable. The corporation would then have become trustee in place of A. H. and R. W. Wilson. Such is always the relation between a body corporate and its stockholders. The interest of the parties in the capital stock of the company should then have been taken and considered as a substitute for their interest in the body of the property itself. Instead of beneficiaries under a trust, their legal *status* became that of stockholders of a corporation.

First, then, was a body corporate in fact created? This may well be doubted. It is unnecessary to define or discuss the nature of a corporation in this connection. In this state, corporations are organized under the general laws, and are therefore creatures of statute, and can be brought into existence only by substantial compliance with statutory provisions. The statute is in the nature of a general grant of the right to exercise corporate franchises to such persons as may comply with its terms. The certificate of incorporation constitutes the evidence of the acceptance of the terms and conditions contained in the statute. After it has been duly filed, it is the only evidence of the existence of a corporation *de jure*. The

requisites of the certificate are clearly stated in the second section of the statute. Gen. St. 1883, § 238.

If any one of these statutory requirements is omitted, such omission is a fatal defect, and confers no *de jure* right to exercise corporate franchises. Tested by this provision of the statute, the certificate in question is clearly insufficient. Disregarding the omissions, which may be considered as mere irregularities, upon examination it will be found that one of the essential requisites of corporate existence does not appear. It contains no provision for directors, trustees or any governing body. By its fifth provision the control and management of its affairs are vested in Alfred H. Wilson, president, Randall W. Wilson, vice-president, and George C. Bates, attorney, etc. These officers can in no sense be regarded as a board of directors. In all regularly constituted corporations they are elected by and are executive officers of the board of directors or trustees. The corporation consists of its shareholders. The control of its affairs is vested in a board of directors. The shareholders elect this board, except for the first year. The number of directors and their names for the first year must be inserted in the certificate. The body corporate can be regularly organized only by and through its directors or trustees. It is their duty to select the officers, who in this instance are named in the certificate. This corporation was not regularly organized. The legal right, therefore, to exercise franchises as a corporation *de jure* was not secured. If the defendants were in a position to question the validity of the certificate in question, or to challenge the right of the corporation to exercise corporate franchises, or its capacity to take title to property, they might successfully do so. *Mining Co. v. Herkimer*, 46 Ind. 142; *Reed v. Railroad Co.* 50 Ind. 342; *Harris v. McGregor*, 29 Cal. 124; *People v. Selfridge*, 52 Cal. 331; *State v. Central, etc. Ass'n*, 29 Ohio St. 399; *Abbott v. Refining Co.* 4 Neb. 416; *Stowe v. Flagg*, 72 Ill. 397; *Bigelow v. Gregory*, 73 Ill. 197; *Doyle v. Mizner*, 42 Mich. 332.

But can the defendants be permitted to raise this question? They participated in the organization of this company. They conveyed the property in controversy to the company. For many months they conducted the common business, in the name of and as officers of the company. Until after the institution of this suit, they never questioned its legal existence. Are they not estopped from denying the existence of the body corporate as a corporation *de facto*? This question must be answered in the affirmative. The principles which must control in the determination of this question have already been settled by this court in *Duggan v. Investment Co.* 11 Colo. 113. The following authorities also lay down a like doctrine: *Baker v. Neff*, 73 Ind. 68; *Close v. Glenwood Cemetery*, 107 U. S. 466; *Hasenritter v. Kirchhoffer*, 79 Mo. 239; *Tayl. Corp.* § 145 *et seq.*

The rule and the reason for it cannot be better stated than in the language of Cooley, J., in *Swartwout v. Railroad Co.* 24 Mich. 389: "It will be seen that the associates, under a statute which authorized them to incorporate themselves, had taken steps for that purpose, had assumed that the purpose was accomplished, and had for some time exercised corporate powers. The defendant was one of their number. He had acted with the rest in laying claim to corporate authority, and he had made payments on the assumption that the claim was well based. * * * The original associates, together with those with whom they became united by the consolidation, were unquestionably a corporation *de facto*, whether they were such *de jure* or not; and, as a corporation in view of the facts in proof, it is reasonable to presume they had contracted debts and incurred obligations. * * * Where there is thus a corporation *de facto*, with no want of legislative power to its due and legal existence; where it is proceeding in performance of corporate functions, and the public are dealing with it on the supposition that it is what it professes to be, and the questions suggested are only whether there has

been exact regularity and strict compliance with the provisions of the law relating to incorporation, — it is plainly a dictate alike of justice and of public policy that, in controversies between the *de facto* corporation and those who have entered into contract relations with it as incorporators or otherwise, such questions should not be suffered to be raised."

The principles established by these authorities are clearly applicable to this case. It necessarily follows that defendants cannot now question the corporate capacity of the Woodmas of Alston Mining Company to take title to the property in controversy, or that the title to the property is actually vested in that company by the deed executed by them.

This *de facto* corporation, therefore, became, and is now, the representative of all the parties. Instead of being beneficiaries, with an interest in the property, the parties have become stockholders in the corporation, and as stockholders their rights are to be determined. The effect of the declaration of the rights of the parties in the capital stock contained in the certificate as a contract need not be determined. The fact that it appears in an instrument, executed before the body corporate was created, is not material. The arrangement was participated in by the entire constituency of the company. This being so, it is obligatory upon all parties in interest, and, having been acted upon by all the members which constituted the corporation, no one of them can be heard to deny that it is binding upon the corporation itself. The effect of this declaration, as an item of evidence, is not so clear. The language used by the parties is as follows: "The capital stock is \$500,000, divided into fifty thousand shares, of \$10 for each share, divided half and half between the parties." There were three parties, and the expression, "divided half and half between the parties," standing alone and unexplained, is without significance, unless construed to mean "equally between the parties."

Bates claimed to be entitled to one-half the capital stock. On the other hand, the Wilsons insist that his interest was to be but one-third. In the light of the evidence and all the circumstances of the case, an equal division seems just and equitable, and upon this basis the rights of the parties will be finally determined. For the reasons which have been stated, the parties must be permitted to work out their equities in the property in controversy through the form and by the means of the corporate organization.

This fact, however, is by no means conclusive upon the issues in this case. These remain practically the same. The entire body of the capital stock is substituted in place of the property. If, as has been stated, at the time this suit was instituted, Bates had been guilty of inequitable or fraudulent misconduct; if a reasonable time had elapsed, and complainants had failed to discharge the contract obligations imposed upon them; if, by reason of their omission to institute the necessary proceedings to perfect the title to the property, by securing patents, or through the purchase under the McBride trust-deed, the defendants have sustained injury which cannot be compensated,—then, notwithstanding the organization of a corporation, the declarations as to the division of the capital stock, the subsequent conveyance of the property to the corporation, and the conduct of the parties under the corporate organization, it was still competent for the court to find that the equities were with the defendants, and not with the plaintiffs. No extended discussion of these propositions is necessary. The facts must be considered in connection with the construction which has been given to the original contract between the parties. It was not the duty of the court below to determine the right of complainant to acquire an interest in the property, but her right to enjoy the benefits of an interest already vested. Time was not of the essence of the contract. Performance was not, had not been made,

a condition precedent by the parties. A decree, therefore, which, in effect, forfeited the estate and the beneficial interest of complainant, was inequitable, unless unavoidable. If, in equity and good conscience, a decree could have been rendered defining the rights of the parties, and providing for their enforcement through the corporate organization; if, by an accounting, the interests of all could have been fairly settled without prejudice to the rights of any, or violation of the original contract,—then this course should have been adopted. That such a decree should have been rendered will be clear, upon a brief consideration of the facts.

Bates did not make application for letters patent, as he had agreed to do. It appears, however, that, by an arrangement between the parties, this application was postponed until after the sale under the decree could be had. It further appears that, before the close of the trial, the present complainant, having taken the necessary steps, as must be presumed, presented the application to the defendants, as officers of the company, with the request that the same be executed in order that she, in her own right and as the representative of her deceased husband, might institute proceedings to secure patents in compliance with the contract. The contention of defendants, that the postponement of the application had resulted in expensive litigation, is not sustained by the evidence. On the contrary, it appears, from the testimony of Alfred H. Wilson himself, that adverse claims were expected at the time, or soon after the property was purchased.

Again, at the first sale under the decree of foreclosure, the property was purchased by the Wilsons, as officers of the corporation. The only reason given by Alfred H. Wilson for his failure to complete the purchase, by the payment of the money, is that he believed nothing was due upon the trust-deed, and he wanted time to investigate. It is true that Bates had failed to provide the

money to bid in the property in the manner insisted upon by the Wilsons. He had, however, proposed to purchase it in the name of his client, undertaking to secure the certificate thereafter, for the benefit of the company. How this was to be done could not be questioned by defendants. His interest to secure the benefit of the foreclosure was equal with their own. As officers *de facto* of the corporation, they had the right to redeem, and could not have been prejudiced by the course proposed by Bates, until the equity of redemption had expired. Notwithstanding his failure to provide the sum required, the parties continued their business as before.

Again, at the second sale, Bates proposed to pursue the same course. The right to purchase, either as an individual or as an officer of the company, was clearly open to Wilson. At that time controversy had arisen between the parties, and he was acting under the advice of counsel. Notwithstanding the opportunity to purchase, he permitted Bates to bid in the property in the name of his client, and to take the certificate of sale. Subsequently, and before the trial was completed, the certificate was obtained for the benefit of the company. It is true that the Wilsons redeemed the property from sale by payment of the amount of the decree. This was done by them, however, without any effort on their part to ascertain whether the certificate was or could be obtained for the benefit of the parties in interest. It was also done after this litigation was begun, under the advice of counsel, acting undoubtedly upon the theory that performance of the original contract by complainant was a condition precedent to acquiring any interest in the property; that the corporate organization was fraudulent and illegal, and could be ignored; and that defendants were the owners of the entire property. This theory cannot be adopted by this court. The evidence contained in the record is very voluminous, and seems to extend to every issue which has been discussed, or which is raised by the plead-

ings. There has been no suggestion in behalf of either party that there is other evidence which should be submitted before the case is finally determined. The form of the decree to be entered by the court below is therefore outlined to some extent by this court.

The judgment of this court is that the decree of the court below be reversed, and that a decree be entered in accordance with the views hereinbefore expressed. Such decree should be so framed as to restrain defendants from interfering with plaintiff in the exercise of her right as a stockholder of the defendant corporation, or from preventing her from making application for patents, in the name of and through the corporate organization, and should require defendants, as officers of that company, to execute all papers necessary in that behalf. It should provide for an accounting between the parties, upon which accounting, among other matters, all sums expended by defendants in the purchase of the property should be allowed, including the amount paid to redeem from the sale under the foreclosure decree; also all sums expended in the operation and development of the property. The amount paid by complainant to secure the certificate of sale should be allowed to her unless already returned. The decree should also provide that, after United States patents have been obtained, all sums necessarily expended by Bates in his life-time in that behalf should be allowed to complainant; that all further sums necessarily expended in obtaining the patents be charged against the interest of complainant; and that, after such accounting, the net proceeds of the property be divided between the parties according to their respective interests in the capital stock of the defendant corporation,—the interest of complainant being one-third, and that of defendants two-thirds; the trial court to make such orders, in respect to the continuance or discharge of any receiver in the action, as the rights and interests of the

several parties and equity and good conscience may require in the premises.

RICHMOND and REED, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the decree is reversed, and the cause remanded for the entry of a decree, and further proceedings in accordance with the views and suggestions therein expressed.

Reversed.

CHIEF JUSTICE HELM not sitting.

14 164
22 348

ARNOLD ET AL. V. WOODWARD.

1. A JUDGMENT IN FAVOR OF A LANDLORD AGAINST HIS TENANT FOR POSSESSION, NO BAR TO AN ACTION BY AN HEIR OF THE TENANT AGAINST THE LANDLORD UNDER A CLAIM OF TITLE.—A judgment in ejectment, by a landlord against his tenant for breach of the conditions of the lease, will not bar a subsequent action against the landlord by an heir of the tenant to recover the land, on the ground that a patent therefor was issued to the tenant during his tenancy, as in the former action the tenant was estopped to deny his landlord's title.
2. THE POSSESSION OF THE LANDLORD RECOGNIZED BY THE INSTITUTION OF SUIT BY THE HEIR.—The bringing of the action by the heir of the tenant is a sufficient recognition that the relation of landlord and tenant had been terminated, so as to entitle the heir to sue for possession under the patent, where the landlord was, and had been for years, in possession under the judgment in the former action.
3. CONSTRUCTION OF THE CLAUSE, "A CLAIM AND COLOR OF TITLE MADE IN GOOD FAITH."—Under General Statutes, section 2186, requiring "a claim and color of title made in good faith" as ground of adverse possession, one cannot hold adversely to another when he knows that his entry in the land-office has been set aside or disregarded, and a patent has issued to the person against whom he claimed an adverse holding.
4. CONSEQUENCE OF FAILURE TO ALLEGE SPECIAL DAMAGE IN EJECTMENT.—Where the complaint in ejectment contains no allegation of special damage, the damages recoverable cannot include the value of the use of the premises by defendant.

Appeal from District Court of Chaffee County.

THE undisputed facts in this case are as follows: In the year 1869, Charles G. Arnold first occupied the lands in controversy, having entered the same for pre-emption in the United States land office at Fairplay, Colo. He proved up on them, and on March 31, 1874, paid the sum of \$200 therefor, taking a receipt in full, describing the lands, from the receiver of the land office. During the year 1874 Arnold leased the premises to one James A. Woodward, who, after entry, and while in possession as such tenant, filed his application for said land in the United States land-office at Fairplay, for the purpose of acquiring title thereto in his own right. Thereupon Arnold brought an action of ejectment under the lease for condition broken for the premises against Woodward, in the district court, and in 1875 recovered judgment, and was thereby restored to the actual possession of the land. Woodward died about this time; but his widow and heir, Mary S. Woodward, continued the litigation. She procured herself to be substituted as defendant in place of her deceased husband, paid the costs in the action, and obtained a new trial.

In March, 1877, a patent to the land was granted by the United States to the heirs of Woodward, deceased, upon the application made by him while he was the tenant of Arnold. The record does not disclose what became of Arnold's pre-emption claim.

On the second trial, which occurred in September, 1877, Mrs. Woodward was permitted, against the objection of Arnold, to introduce in evidence the patent to the Woodward heirs, and upon this proof a verdict and judgment were rendered in her favor for possession of the premises; but, before possession was restored to her, Arnold appealed the case to this court. In November, 1878, that judgment was reversed on the sole ground that neither Woodward nor his heirs could in that suit

make use of the patent acquired by virtue of steps which he had taken while he was a tenant of Arnold to defeat the title of his landlord. The cause being remanded to the district court, no further action has ever been taken therein; and Arnold, in the mean time, has remained in possession of the premises, paying the taxes thereon.

In March, 1883, this present action was commenced by said Mary S. Woodward, as plaintiff, against said Charles G. Arnold, as defendant, to recover possession of the same premises described in the former action. The defendant Arnold, among other things, pleaded the commencement of the former suit, the proceedings thereunder, the reversal thereof by this court, and its continued pendency, peaceable possession, and payment of taxes, as an answer to the action. On this trial in the district court the plaintiff read in evidence the same patent as on the second trial of the former suit. The opinion of this court (*Arnold v. Woodward*, 4 Colo. 249) and the bill of exceptions in the original case were admitted in evidence without objection; and it was also admitted that the plaintiff is the sole heir of James A. Woodward, deceased, and that she resides in Chaffee county, Colorado, and that defendant is in possession of the land in controversy. Upon this proof of title alone, the facts hereinbefore stated being admitted or proved without contradiction, a finding and judgment were rendered in favor of plaintiff by the court for the possession of the property. The defendant Arnold appeals again to this court.

Messrs. PATTERSON & THOMAS, for appellants.

Messrs. WELLS, McNEAL & MACON, for appellee.

RICHMOND, C. The present and former actions between these parties relating to the land in controversy are dissimilar. In the former, Arnold was plaintiff, and, though he proceeded in ejectment, yet his suit was based upon the lease to Woodward, and possession was claimed for

condition broken. The right to possession, as between landlord and tenant, was alone in controversy. Woodward's possession as tenant at that time under the lease being then admitted, the question of title was not and could not be litigated; for "the tenant is estopped to deny the landlord's title." By entering upon and occupying the premises under the lease, Woodward and his heir were estopped from questioning Arnold's ownership, and from introducing the patent which during the tenancy had been acquired by Woodward from the United States. The present action, on the other hand, was instituted by Mrs. Woodward in ejectment against Arnold to try the title to the premises. The lease was ignored in the complaint, and the action brought upon the assertion of a fee-simple ownership under the patent. It is therefore apparent that, besides a reversal of the position of the parties, the pleadings, the issues made, the relief sought, and the evidence admissible in the two cases were radically different. A judgment for Arnold in the former suit would not estop Woodward from prosecuting the present suit. It follows, therefore, that that suit could not bar or abate this one. 6 Wait, Act. & Def. 499, and cases; *Vance v. Olinger*, 27 Cal. 358; *Screw Co. v. Bliven*, 3 Blatchf. 240; *Osborn v. Cloud*, 23 Iowa, 104.

It is said, however, that Mrs. Woodward could not rely upon her patent title until the property held under the lease had been surrendered, and thus the relationship of landlord and tenant terminated. This proposition was announced by the court, on appeal, in the former suit. *Arnold v. Woodward*, 4 Colo. 249. Upon the reversal and remanding of that cause, Mrs. Woodward acquiesced in the conclusion then pronounced by this court, and took no further steps in that suit. Her sole defense to that action had been declared entirely unavailing, and Arnold was in position to take his judgment, or perhaps to dismiss his action; for he held the actual and exclusive possession, having obtained the same as a result of the first trial. At the time of commencing the present action,

Mrs. Woodward was not, and for years had not been, in possession of the premises. She did not assert, and for years had not in any way asserted, her right to such possession as a tenant or otherwise. By commencing the present action to try the title she satisfied fully, if she had not done so before, the requirement concerning a surrender of property. The institution of this suit is clearly a recognition by Mrs. Woodward of the fact that the relation of landlord and tenant no longer exists; also that she is not in possession, but that Arnold is. The law commands no foolish or needless acts. To say that, under the circumstances, it was her duty, before commencing this suit, to notify Arnold that she voluntarily surrendered a possession which she did not have, would be to command an idle and useless ceremony; or to hold that, as a condition precedent to her assertion of the present right of action, she should have withdrawn her answer, and notified the court below that judgment might be taken against her in the former suit, would be to require a proceeding equally superfluous; she did not control that suit, and its result was a matter of indifference to her. We think that plaintiff, having a patent from the United States, was entitled to assert her rights thereunder in the present suit.

It is scarcely necessary to add that there is no inconsistency between this decision and the decision in *Arnold v. Woodward, supra*. That case simply held that, since the patent in question was obtained while Woodward was a tenant under the lease, he could not rely upon it in defending the action of Arnold as lessor or landlord, for possession against him as lessee or tenant; and that he was bound to surrender, and thus terminate the tenancy, before he could be permitted to assert his title. Holding, as we now do, that there has been a surrender of such possession and a termination of the tenancy, the obstacle to the assertion of ownership under the patent has been removed.

The claim of a bar by the statute of limitations (Gen.

St. § 2186) is not well taken. Arnold's entry in the land-office had been set aside or disregarded, and the patent from the United States had issued to Woodward. Such issuance of the patent necessarily indicates that all steps required in connection therewith were duly taken. *Arnold v. Woodward, supra*. During a large part of the period covered by Arnold's alleged adverse holding, these facts existed and were known to him. Under the circumstances, there was not such a "claim and color of title made in good faith" as laid the foundation for an application of the statute. *Spellman v. Curtenius*, 12 Ill. 415.

The complaint in the present action contained no allegation of special damage; therefore the damages recoverable could not include the value of the use of the premises during their occupancy by Arnold. *Larned v. Hudson*, 57 N. Y. 151. It follows that the admission of testimony and the instruction to the jury on this point were erroneous.

For error in the measure of damages adopted, the judgment must be reversed.

REED and PATTISON, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is reversed.

Reversed.

MR. JUSTICE ELLIOTT (*dissenting*). There is one important particular in which I cannot concur in the able opinion of Mr. Commissioner RICHMOND. The correctness of the decision in *Arnold v. Woodward*, 4 Colo. 249, whereby that case was reversed and remanded, is conceded by counsel for appellee. They also admit that upon a retrial of that case the present plaintiff must inevitably be defeated. It is difficult to perceive how her cause is improved by the present action. It will be observed that the former suit is between the same parties

as this, it is of the same nature, it concerns the same subject-matter, the same relief is sought, and it is still pending. Mrs. Woodward seeks in both actions to establish the same title upon the same evidence. It is true, the parties occupy reverse positions as plaintiff and defendant; but the present plaintiff, if successful *as defendant* in the former suit, would be entitled to the same relief as if successful *as plaintiff* in the present action. R. S. 1868, ch. 27, § 30. A more complete identity of parties, nature, and cause of action, subject-matter, relief and evidence could hardly arise.

It is claimed, however, that the relation of landlord and tenant no longer exists, and that, in this respect, the present action differs from the former one. In the former opinion it is said that the steps taken by Woodward to acquire title from the United States during his tenancy under Arnold were of necessity hostile to his landlord's title, and that, before he could assert any rights under a title thus acquired, he must surrender possession of the premises. From this and other language in the opinion it is insisted that, though a tenant may not use a superior title acquired by his own act hostile to the title of his landlord during the tenancy as a defense to a suit *brought by his landlord* against him for possession, yet that he may, by *surrendering possession*, use such superior title in an action thereafter *brought by himself* to regain possession from his former landlord. Conceding the correctness of this proposition, it avails the plaintiff nothing in the present action; its terms are not broad enough to include a party in her situation. Plaintiff has never *surrendered* possession of the premises in any proper sense of the term. On the contrary, she has strenuously resisted the landlord's efforts to regain possession; and, though driven from the field by legal process, has steadily maintained an attitude of hostility. So long as the former action remains pending and undisposed of, it is in law a continuing

menace to the landlord's possession. A *surrender* implies a yielding up of the lesser estate by the tenant to him who has the immediate estate in reversion or remainder, whereby the lesser estate is merged in the greater by *mutual agreement*. Bouv. Law Dict. The surrender must be voluntary, or, at least, the controversy concerning the possession must be fully terminated before the tenant can be permitted to assail the landlord's title by means of a title inconsistent therewith, acquired through hostile action on his part, while the tenancy continued.

While the former action remains pending and contested, it cannot be well said that plaintiff has surrendered possession; but her *status* in respect to the property must be considered the same in legal effect as if she had remained in possession while the case was being litigated through the various courts. In actions of ejectment under our practice the party in possession may retain it until final judgment, and during the prosecution of an appeal; and if a change is effected through legal process before the final termination of the litigation, it does not affect the rights of the parties. R. S. 1868, *supra*.

But it is said that plaintiff has acquiesced in the conclusion pronounced by this court on the former appeal. In what manner has she manifested this acquiescence? The only final judgment ever pronounced against her was on the first trial of the former action. That judgment she caused to be *vacated*, as she might do under the statute then in force (R. S. 1868, ch. 27, § 26), and upon the second trial the judgment was in her favor. This court reversed the latter judgment and remanded the cause, but did not enter final judgment nor direct the district court so to do. Since then no action whatever has been taken in the cause by either party, and there is no final judgment therein remaining of record anywhere.

It is urged that the lapse of time during which Mrs. Woodward remained out of possession, forbearing to assert any claim to the premises, is a circumstance strengthening her right to maintain this action before the termination of the former one. A most novel doctrine, that a claim is to be received with more favor because it is stale! Great virtue is also claimed for the commencement of this action as an evidence of acquiescence and surrender on the part of plaintiff. A singular way to manifest acquiescence in defendant's claim, to commence a fresh action against him for the same cause before the former action is terminated! The surrender of possession spoken of in the former opinion must mean something more than a mere physical change of possession,—as the putting of Woodward out and the putting of Arnold in,—for that kind of a change had already taken place before the second trial of the former action occurred; and yet it was held erroneous to admit the Woodward patent in evidence against Arnold on that trial, and the judgment based thereon was reversed for that very reason. How, then, can the present judgment be sustained on the same evidence? As we have seen, the former action in all its aspects is precisely the same as the present. Since long before the second trial of the former action the possession of the property and the attitude of the parties in relation thereto have remained *in statu quo*. No change whatever has occurred. Mrs. Woodward has not given or offered any deed of surrender; she has not moved the former action to trial or judgment, nor attempted so to do; she has not withdrawn her answer, nor offered to allow judgment to be taken therein; she has in no way acknowledged the landlord's original title, nor done any act signifying her acquiescence therein. Her attitude is the same as it was when she paid the costs of the first suit, and obtained a new trial. Everything remains in the precise condition it was when the second trial was

entered upon. The cause stands contested upon the record, the same as if there had never been a trial. In this view, the matter is too plain for argument that, since Mrs. Woodward confessedly cannot introduce the patent to defeat the former suit pending, she cannot, without in some way disposing of the obstacle thereto, maintain a fresh action against Arnold for precisely the same cause, by the introduction of the self-same patent. It would be a strange anomaly in our jurisprudence if, where two actions in ejectment are pending at the same time, in the same court, involving the same title to the same land, and between the same parties, occupying the same position in respect to the property in the one case as in the other, one party might recover the possession in one action, and the other party recover it in the other action, upon precisely the same evidence. If this be allowable, when and where will the litigation end? If plaintiff may oust defendant by the present action, what is to prevent defendant from regaining possession by prosecuting the former suit to judgment, since it is conceded that plaintiff cannot defend against it? In 1 Bag. Abr. 29, it is said: "The law will not allow two *quare impedit*s to be brought for the same presentation, viz., a second by the defendant against the plaintiff, when there is one pending in the court by the plaintiff against the defendant; *et sic in brevi de partitione*, because the defendant can have the same remedy on the first writ as he could on a second. The law is so watchful against all vexatious suits that it will neither suffer two actions of the same nature to be pending for the same demand, nor even two actions of a different nature." R. S. 1868, ch. 27, § 30; Tayl. Landl. & Ten. § 705; 6 Wait, Act. & Def. 496 *et seq.*; *Ward v. Gore*, 37 How. Pr. 119; *Parker v. Colcord*, 2 N. H. 36; *Tracy v. Reed*, 4 Blackf. 56; *Hart v. Granger*, 1 Conn. 154; *Colt v. Partridge*, 7 Metc. 575; *Ryerson v. Eldred*, 18 Mich. 12; *Doe v. Baytup*, 30 E. C. L. 105.

It follows from the foregoing that, under the pleadings and proof, the former suit pending should be held sufficient to abate the present action, and that the judgment by the district court should be reversed for that reason.

Reversed.

SICKMAN ET AL. V. ABERNATHY ET AL.
SAME V. HAX.

1. **TRANSFER OF STOCK IN TRADE BY INSOLVENT FIRM — RATIFICATION BY CREDITORS.**— Where an insolvent firm has transferred all its property, taking notes in payment, its creditors, who have not sought to have the sale set aside, but have acquiesced in it, and treated it as legitimate, by proceeding against the purchasers by attachment for the money supposed to be due on the notes, cannot question the *bona fides* of the sale.
2. **VALIDITY OF PAYMENTS MADE BY PURCHASERS OF STOCK CANNOT BE QUESTIONED COLLATERALLY.**— Nor can they in such proceeding attack the validity of payments made by the purchasers, though the latter had knowledge of the firm's indebtedness, since there is no privity between them and the purchasers.
3. **RIGHT OF PARTNERSHIP FIRM TO CONTRACT AS TO MANNER OF PAYMENT OF NOTES TO BECOME DUE IT ON SALE OF ITS EFFECTS.**— In such proceeding, evidence as to contracts between the firm and the purchasers, as to the application on notes of accounts due the firm by the partners individually, and assigned to the purchasers with the other firm accounts, is immaterial, since the parties had a right to make any contract they chose as to the mode of paying the notes.
4. **CREDITOR'S LIEN ONLY EXISTS WHEN PROPERTY IS IN CUSTODIA LEGIS.**— No creditor's lien can attach to the partnership assets of an insolvent firm until they have been brought into the custody of the law by the interposition of the court.
5. **BONA FIDE PURCHASERS NOT LIABLE TO GARNISHMENT AFTER PAYMENT OF PURCHASE MONEY.**— The right of a creditor to garnish property, effects, etc., of a debtor, in the possession and charge, or under the control, of a third person, under General Statutes, section 1554, does not apply as against purchasers, without fraud, of the property of an insolvent partnership, who have paid the purchase money.

Appeals from District Court of Larimer County.

IN October, 1881, Alonzo P. Sickman and S. B. Livingston formed a partnership for transacting a mercantile business; were equal partners; only continued in business until about the 4th day of February following, when the firm of Livingston & Sickman sold to Jonathan Sickman (father of A. P. Sickman) and T. H. Davy, and by bill of sale assigned and transferred to them, the entire stock of goods then on hand, book-accounts, credits and good-will, for the sum of \$15,000, and received in payment three notes, of \$5,000 each, made by Sickman & Davy, due, respectively, sixty, ninety and one hundred and twenty days after date. Livingston & Sickman at the time of the sale were badly in debt, if not insolvent. Immediately upon commencing business, or very shortly afterwards, Sickman & Davy commenced to pay the \$15,000 for which the notes were given, without regard to the time of their maturity. Such payments were made upon the orders of Livingston & Sickman, and paid either in cash or by substituting the paper of Sickman & Davy for that of Livingston & Sickman. At the time of the purchase by Sickman & Davy, A. P. Sickman was indebted to the Poudre Valley Bank for \$2,000 for money borrowed, for which the bank held his note, which, with interest, amounted to \$2,083, on April 19, 1882, at which time it was paid by Sickman & Davy at the request of Livingston & Sickman, and a credit given for the amount upon one of the \$5,000 notes of Sickman & Davy.

Among the accounts standing upon the books of the old firm at the time of the sale which were assigned to Sickman & Davy was a personal account of A. P. Sickman, due the firm of Livingston & Sickman, of \$827.16; one of S. V. Livingston, \$665.43; and another of Livingston, called the "house account," of \$1,066.99,—Livingston's two amounting to \$1,732.42; also, an account against one L. W. Welch of \$409.22, against which Welch

had a set-off for the full amount, which did not appear upon the books. These several accounts, amounting to \$2,968.80, together with a bill of goods, amounting to \$254.78, bought by Livingston from Sickman & Davy after the transfer, making in the aggregate over \$3,000, were, by the mutual agreement of Livingston and A. P. Sickman with Sickman & Davy, indorsed as credits upon the notes of the latter. These being the payments over which the controversy arose, others need not be noticed.

About the 1st of March, 1883, appellees Abernathy and Hax, respectively, commenced proceedings by attachment against Livingston and A. P. Sickman for sums due them for goods sold, and Jonathan Sickman and Davy were served as garnishees. They having answered that they were not indebted, the answers were traversed.

After trials had been had in the county court, appeals were taken to the district court, a trial had by jury, resulting in favor of the garnishees, which verdict was set aside by the court. In March, 1885, another trial was had, resulting in finding the garnishees indebted to Livingston & Sickman in the sum of \$3,123.44. From these judgments, appeals were taken to this court.

Errors are assigned upon the giving by the court of the third, fourth, seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth instructions on the part of plaintiffs, and upon the refusal of the court to give two instructions asked by garnishees.

Messrs. BALLARD, ROBINSON & LOVE, for appellants.

Messrs. HAYNES, DUNNING & ANNIS, for appellees.

REED, C. At the time the suits by attachment against Livingston & Sickman, and the proceeding by garnishment of Sickman & Davy, were commenced, the three notes of the latter, which were negotiable, had been paid to the satisfaction of the payees, delivered up to the mak-

ers, and the whole transaction closed. Section 12, chapter 46, General Statutes, 520, is as follows:

“No person shall be liable as a garnishee by reason of having drawn, accepted, made or indorsed any negotiable instrument, when the same is not due in the hands of the defendant at the time of service of the garnishee summons, or the rendition of the judgment.”

This might, perhaps, be considered as concluding this case, when applied to the facts, if our construction of it is correct; but the learned and experienced judge before whom the case was tried does not seem to have so considered it. Neither did the counsel. The importance of the case seems to render a full discussion of the questions presented necessary.

At the time of the sale and transfer of the assets of the defendants to the garnishees, the attendant circumstances and relation of some of the parties were such, perhaps, as to raise a doubt in regard to the honesty of the transaction sufficient to have caused an investigation by the creditors, which might have been had under proper proceedings; and, if found fraudulent, the sale could have been set aside, and the entire property in the hands of Sickman & Davy subjected to the payment of the debts, or, if found best, the sale could have been affirmed, and provision made for the application of the entire proceeds to the payment of the debts. But no such course was taken. The creditors, instead of questioning the honesty of the sale, acquiesced, treated it as legitimate, and elected to proceed against the purchasers for money supposed to be due. By the course pursued, the sale and transfer of the assets of the firm to the garnishees was ratified. There are numerous authorities in support of this proposition. In *Bishop v. Trustees of Hart*, 28 Vt. 75, it is said:

“By instituting this suit to recover the avails of the property assigned, and therein charging them as trustees under the assignment, they have not only ratified the

assignment itself, but also any disposition of the property which may have been made by the trustees under it. The plaintiffs will not be at liberty after that to question the legality of any transfer of the property which the trustees may have made."

After having acquiesced in the sale, and by failing to institute proper proceedings, and by instituting this suit, having ratified the sale, it is clear the creditors could not challenge the *bona fides* of the transaction, nor impeach it for fraud. Neither could they attack collaterally, on the proceeding against the garnishees, the validity of the payments made. To have enabled them to successfully attack it, there must have been some privity existing between the creditors and garnishees; otherwise, the transaction, being one they had affirmed, rested entirely with the parties to the purchase and sale. A knowledge of the indebtedness of the old firm, of itself, imposed upon the purchasers no obligation, either legal or moral, in regard to the application of the funds. Such obligation could only be imposed by contract, or by the intervention of legal proceedings. Unless creditors intervened by proper suits while an indebtedness existed, the garnishees could not be affected by the question of solvency or insolvency of the parties, or their own knowledge, or want of knowledge, on that subject. An individual or firm may be notoriously insolvent, and yet, as long as they are unrestrained at law by legal proceedings, can continue to do business as if absolutely solvent. A purchaser can take good title to any property purchased, and discharge his indebtedness in any agreed manner.

There was evidently a misconception by the court in regard to the law applicable to the case. As before stated, previous to the closing of the transactions between the old firm and the new one, no suit was instituted. There are two propositions of law necessary to be discussed in this connection: *First*, until a court interposed, and the assets of the firm were in the custody of the law, there

could be no creditors' lien upon partnership assets, as supposed by the court; *second*, previous to intervention and custody of assets by the court, the right to have firm assets applied to the payment of firm debts in preference to those of the individual debts of the partners was one that pertained to the firm, and individuals composing the firm, and in no wise pertains to the creditors of the firm.

In *Case v. Beauregard*, 99 U. S. 119, it is said: "So long as he * * * (the partner) retains an interest in the firm assets as a partner, a court of equity will allow the creditors of the firm to avail themselves of his equity, and enforce through it the application of those assets, primarily, to payment of the debts due them, whenever the property comes under its administration. It is indispensable, however, to such relief, when the creditors are, as in the present case, simple contract creditors, that the partnership property should be within the control of the court, and in the course of administration, brought there by the bankruptcy of the firm, or by an assignment, or by the creation of a trust in some mode. This is because neither the partners nor the joint creditors have any specific lien, nor is there any trust that can be enforced until the property has passed *in custodia legis*."

This case was followed by another between the same parties in 101 U. S. 688, where the decision was reaffirmed. This was followed by *Fitzpatrick v. Flanagan*, 106 U. S. 648, where nearly the identical question involved in this case was presented. In that the court below instructed the jury as follows: "If you shall find from the evidence that the defendant sold or transferred any of the property or assets of the late firm of Fitzpatrick Bros. with intent to prevent the creditors of the firm of Fitzpatrick Bros., or any of them, from collecting their debts, such sale or disposition will sustain this ground of attachment. It was the duty of the defendant, as such surviving partner, to apply all of the assets of the firm to the payment of the debts due by the firm; and, if he

appropriated any part of them to the payment of his individual debts, it was a fraud upon the firm creditors, whether he so considered it or not, and, if established by the proof, will sustain this ground of attachment, as the law will presume that he intended the natural result of his act."

In the opinion of the court the learned Justice Matthews (since deceased) said: "It is fair to consider this charge, although not so qualified, in connection with the facts, in reference to which there was evidence that the firm of Fitzpatrick Bros. and its individual members were insolvent, in the sense of not being able to pay their debts, during the whole period of its existence, and the additional fact that the deceased partner had before his death drawn from the partnership more than his interest therein, and was indebted to the firm. The legal right of a partnership creditor to subject the partnership property to the payment of his debt consists simply in the right to reduce his claim to judgment, and to sell the goods of his debtors on execution. His right to appropriate the partnership property, specifically, to the payment of his debt, in equity, in preference to creditors of an individual partner, is derived through the other partner, whose original right it is to have the partnership assets applied to the payment of partnership obligations; and this equity of the creditor subsists as long as that of the partner through which it is derived remains;"—and, after quoting the paragraph above cited, from *Case v. Beauregard*, proceeded to say: "Hence it follows that 'if, before the interposition of the court is asked, the property has ceased to belong to the partnership, if by a *bona fide* transfer it has become the several property either of one partner or of a third person, the equities of the partners are extinguished, and consequently the derivative equities of the creditors are at an end.'"

Further, speaking of *Case v. Beauregard*, he said: "In that case it was held, in respect to a firm admitted

to be insolvent, that transfers made by the individual partners of their interest in the partnership property converted that property into individual property, terminated the equity of any partner to require the application thereof to the payment of the joint debts, and constituted a bar to a bill in equity filed by a partnership creditor to subject it to the payment of his debt; the relief prayed for being grounded on the claim that these transfers were in fraud of his rights as a creditor of the firm,"—and then cited with approval the case of *Schmidlapp v. Currie*, 55 Miss. 597, where it is said: "The doctrine that firm assets must first be applied to the payment of firm debts, and individual property to individual debts, is only a principle of administration adopted by the courts where, from any cause, they are called upon to wind up the firm business, and find that the members have made no valid disposition of, or charges upon, its assets. Thus where, upon the dissolution of the firm by death or limitation or bankruptcy, or from any other cause, the courts are called upon to wind up the concern, they adopt and enforce the principle stated; but the principle itself springs alone out of the obligation to do justice between the partners."

"In that case, one of two partners, but with the assent of the other, and without any fraudulent intent, transferred the whole business and stock of the firm to a third person in payment of an individual debt. A creditor of the partnership sued out a writ of attachment against them, and caused it to be levied on the goods in the possession of the purchaser, upon the ground that the transfer of the firm goods in satisfaction of the individual debt of one of the partners was fraudulent and void as against firm creditors;" and it was held that an attachment would not lie.

The learned justice, in *Fitzpatrick v. Flannagan*, *supra*, after stating that the same principle applied in cases of dissolution, whether voluntary or by the death

of a partner, proceeded to say: "And unless a partnership creditor, or the personal representatives of the deceased partner, commenced such a proceeding to liquidate the affairs of the partnership, there is nothing to prevent the surviving partner from dealing with the partnership property as his own, and acting in good faith to make valid dispositions of it; * * * and if, in like good faith, with the acquiescence of the personal representatives of the deceased partner, he uses the firm property to continue the business on his own account and in his own name, he does it without other liability than to be held accountable to the estate of his deceased partner for a share of the profits, or, as we have seen, upon a bill filed for that purpose by the personal representatives of the deceased partner or a partnership creditor to wind up the firm business, and apply its assets to the payment of its debts. Any intermediate disposition of the property made in good faith, even although it may have been specifically a part of the partnership assets, and even if it has been applied to the payment of his individual obligations, will be valid and effectual, and, without circumstances showing an actual intention to defraud, cannot be treated as a fraud in law upon the partnership creditors."

In 1 Bates, Partn. § 540: "Each partner has the right to require that all the assets be applied to the payment of debts, for otherwise his own liability *in solido* for them all would be undiminished. This is a right which appertains to him personally, and not to the partnership creditors. In case the assets pass under the control of the courts for distribution, either by reason of bankruptcy, death, or suit for accounting and dissolution, not only will the rights of the partners to have the debts paid be carried out, but the court will subrogate the credits to this right, and treat it as an obligation, provided it had not been parted with by the partners at the time the court came into possession of the fund."

In 2 Bates, Partn. § 820, it is said: "While creditors have no lien nor claim upon the partnership assets other than any individual creditor has against his debtor's property, except as derived in consequence of the partner's equity, as will be seen, yet each partner has an equity to compel the application of the assets to the joint debts."

And in section 824: "As stated at the beginning of this chapter, the partnership creditors, except when they are given the benefit of the partner's equity, have of themselves no other claim than any creditor has on his debtor's property. The right of a partnership creditor to be paid has been extended in many jurisdictions beyond what the logic of its original foundation will warrant. The partners have jointly the same right of absolute disposition of their joint property that any individual has. They may sell it, pledge it, convert it into other forms, divide it up among themselves, devote it to the payment of debts, or part of the debts, or exercise other ownership over it, subject only to each other's rights, and to the operation of statutes forbidding voluntary conveyances to hinder and defraud creditors."

And these positions are sustained by numerous authorities both in England and the different states. See, also, Story, Partn. §§ 347, 358, 362, and notes. Further, to the point that creditors have no lien except through the partners, and that when the assets have been disposed of by the consent of the partners the equity of the individual partners has been extinguished, and no lien remains to the creditors, see *Hoxie v. Carr*, 1 Sum. 173; *Allen v. Center Val. Co.* 21 Conn. 130; *McDonald v. Beach*, 2 Blackf. 55; *Kistner v. Sindlinger*, 33 Ind. 114; *Harris v. Peabody*, 73 Me. 262; *Glenn v. Gill*, 2 Md. 1; *Locke v. Lewis*, 124 Mass. 1.

This, according to all the authorities, is the law as applicable to the creditors, the firm, and the individual members of the firm; and it will readily appear that the law supposed by the court to be applicable to the gar-

nishees would not have been correct if attempted to be applied on attachment proceedings by creditors against Livingston & Sickman; for, as between them, fraud *per se* could not be presumed.

Section 20, chapter 43, General Statutes, is as follows: "The question of fraudulent intent in all cases arising under the provisions of this title shall be deemed a question of fact, and not of law, nor shall any conveyance or charge be adjudged fraudulent against creditors or purchasers solely on the ground that it was not founded on a valuable consideration."

One who alleges fraud must clearly and distinctly prove the fraud he alleges. *Beatty v. Fishel*, 100 Mass. 448; *Klein v. Horine*, 47 Ill. 430; *Morgan v. Olvey*, 53 Ind. 6.

"In order to establish fraud, the true rule, in all courts, is to require such legal evidence as will overcome in the mind of the tribunal the legal presumption of innocence, and beget a belief of the truth of the allegation of fraud." *Marksbury v. Taylor*, 10 Bush, 519.

There is a wide distinction between fraud *per se* (a fraud at law) and fraud in fact. The first, as shown by the instructions, was assumed to exist and control. If, in this case, there was any question of fraud, it was a question of fraud in fact, depending upon the intention of the parties to be charged, and to be determined by the jury, on proper instructions, and not by the court. *Bigelow*, Fraud, 139; *Milne v. Henry*, 40 Pa. St. 352; *Twyne's Case*, 1 Smith, Lead. Cas. (5th ed.) 47, Amer. note.

The *bona fides* of the sale could, as has been shown, only have been tried in a proceeding to set it aside. "The general rule is that the garnishee is not chargeable unless the defendant could recover of him what the plaintiff seeks to secure by garnishment." Wap. Attachm. 202; Drake, Attachm. § 458. And this rule has been adopted and decided to be the law in the federal courts, and in the courts of nearly if not all the states. This

rule is subject to this exception: "Where the garnishee is in possession of *effects* of the defendant under a fraudulent transfer from the latter, there, though the defendant would have no claim against the garnishee, yet a creditor of the defendant can subject the effects in the garnishee's hands to his attachment." Drake, Attachm. § 458; Wap. Attachm. 215. The reason is obvious: The defendant, by making a fraudulent transfer, precludes himself from proceeding at law to recover the value, while the creditor is not precluded.

The court and counsel for appellees seem to have misapprehended our statute, and the proper application of the exception above stated. Under our statute, and it is substantially the same in nearly all the states, garnishment will be effective — *First*, where the garnishee is *indebted* to the defendant either in money or property; *second*, when the garnishee is in possession and charge of, or has under his control, any property, *effects*, goods, chattels, rights, credits or choses in action of the defendant. Gen. St. p. 518, § 1554; Code 1883, § 104.

It will be observed that the two are entirely distinct and separable. The language of the exception and the authorities confine it entirely to the second. It is "*effects*" in the hands of the garnishee, as contradistinguished from the debt payable in money or property. In this case the proceeding was under the first clause, for a debt payable in money, while the law supposed to apply was only applicable to the second clause, where the garnishee had effects of the defendant, where by reason of the fraud no title had passed to the effects, and they could be subjected to attachment as the property of the defendant, when he had precluded himself from asserting his legal ownership.

There is no evidence whatever of an intended fraud. It could only have been assumed or inferred from the supposed illegal application of the personal accounts to the payment of the notes. The fraud contemplated in.

and to be prevented by, law, is the illegal disposition of property by transfer, to place it beyond the reach of the creditor, with the expectation of subsequently deriving some benefit himself from it or its proceeds. Without such intention or expectation, there could be no motive. Section 11, chapter 43, General Statutes, page 509, is as follows: "All deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of goods, chattels, or things in action, made in trust for the use of the person making the same, shall be void as against the creditors, existing, of such person."

By no possibility, in this case, could the indorsement of the amount upon the notes, and canceling so much of the indebtedness, have inured to the benefit of the defendants. It was clearly against their interest, and can only be explained as being done in pursuance of the agreement made at the time of the purchase.

It is assigned for error that the court refused to allow the witness Jonathan Sickman to testify further as to what the contract between the parties was in regard to the individual accounts of the members of the old firm. We think this was not an error, not on the ground on which it was presumably put by the court, that the indorsements were fraudulent *per se*, but from the fact that the inquiry was unimportant, being one that could not legally arise in a controversy between creditors and garnishees, under the circumstances and facts as before shown. We do not intend to be understood as holding that the debts of individual partners, due to the firm of which they are members, can or cannot be assigned so as to pass as assets of the firm by a sale. A case might arise where it would become necessary to determine the question; but, in our view, it is not necessary to determine it here. There were no intervening suits. The property was not in the custody of the law. The parties to the contract all united in the transaction, and its conclusion was mutually satisfactory. A mutual mistake of the parties in

regard to the law, if one was made, could not vitiate the transaction. The creditors, by the course pursued, as shown above, had ratified it, and could not raise and adjudicate the question of legality in a proceeding against garnishees to recover a supposed debt. If, as appears, the accounts were sold, and the amounts were to be, and were, deducted from the purchase price, then they became and were a part of the consideration for which the notes were given, and when indorsed were a payment *pro tanto*. To hold otherwise would be to make a new contract, never contemplated by the parties, and increase the purchase price over \$3,000. To arbitrarily say that the individual accounts could not be regarded in law as assets, and transferred,—hence, that the indorsements of the amounts upon the notes were illegal, and no payment,—and that the garnishees were liable for the amounts to the attaching creditors, would be to create a debt for that amount due the defendants, which creditors could appropriate, never contemplated by defendants or garnishees; one that had been satisfactorily settled and discharged by the only parties legally concerned; a debt in favor of defendants that they could in no wise enforce as against the garnishees.

We think the learned judge erred in his instructions to the jury, particularly in those from 7 to 13, both inclusive, given on the part of plaintiffs. They were inapplicable in the case presented. They are based upon the mistaken theory that the garnishees were the trustees of the creditors of the old firm, and as such chargeable with the proper application of the funds. As shown, the position is not tenable. It was a purchase and sale in which creditors in no way participated, nor in any way attempted to interfere, by suit or otherwise, until the whole purchase price had been paid, and the transaction closed to the mutual satisfaction of all the parties having a legal right to question it. It follows that the learned judge was mistaken, not as to the law

controlling the application of partnership funds, but in applying in this case the principles of law only applicable to the funds, assets, or effects of partnership, when, by proper suits, they were in the custody of the court for distribution.

The judgment should be reversed and the garnishees discharged.

RICHMOND and PATTISON, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgments are reversed, and the causes remanded, with directions to discharge the garnishees.

Reversed.

MR. JUSTICE ELLIOTT not sitting.

MCQUOWN V. CAVANAUGH.

1. EVIDENCE — WHEN TERMS OF ORIGINAL CONTRACT OF HIRING ADMISSIBLE IN SUIT BY AN EMPLOYEE AGAINST A SUCCESSOR IN BUSINESS.— Where a man in trade hired an assistant at a stipulated *per diem*, and afterwards, as agent of his wife, who succeeded to the property and business, continued to allow and pay him at the same rate for his services; but the wife, on assuming personal supervision, refused to allow and pay him at the same rate for the time then due, claiming that the contract made with the husband was not binding on her, it is proper for the plaintiff to prove the original contract of hiring.
2. INSTRUCTIONS — IN ORDER TO HAVE SAME REVIEWED THE ENTIRE CHARGE MUST BE EMBRACED WITHIN THE TRANSCRIPT.— In construing a charge to the jury the entire charge must be considered; and where appellant does not embrace within the transcript the entire charge given, the supreme court cannot determine whether or not the jury were misled by the charge to which exception is taken.

Appeal from Arapahoe County Court.

Mr. J. W. HORNER, for appellant.

Mr. J. W. MULLAHEY, for appellee.

14	188
1a	436
14	188
3a	135
14	188
18a	352

RICHMOND, C. In this action plaintiff below and appellee here sought to recover, for work and labor performed, a balance due, amounting to \$95.37. It appears from the record that the plaintiff was in the employ of George L. McQuown, and that McQuown had agreed to pay him the sum of \$3.50 per day; that he worked for McQuown until September 21, 1884, when McQuown made an assignment, and the appellant, Lowena McQuown, wife of George L. McQuown, purchased at sheriff's sale the stock, and continued the business in her name, with George L. McQuown as her agent; that plaintiff continued to labor for Mrs. McQuown, charging the same price per day for such labor, which was paid.

Subsequently a receiver was appointed, and there was a balance due plaintiff, which the receiver was authorized to pay; that plaintiff charged in his bill for his labor \$3.50 per day, and George L. McQuown approved and certified the account, which was paid; that thereafter Mrs. McQuown resumed business, and plaintiff continued in her employ for some length of time, claiming the same rate per day, but defendant only allowed \$3 per day.

It is contended by appellant that the contract with George L. McQuown, of \$3.50 per day, was not binding upon her, and that plaintiff's services were only reasonably worth the sum of \$3 per day.

Several witnesses testify, in behalf of defendant, to the effect that the usual rate of wages for such labor is \$3 per day. The cause was tried to the jury, and verdict in favor of the plaintiff, assessing his damages at \$95.37.

But two propositions are submitted or discussed by appellant. First, that the court erred in permitting the plaintiff to testify to the contract with George L. McQuown made prior to the time that Mrs. McQuown succeeded to the business. We do not think this position tenable, for the reason that it is admitted that George L. McQuown was acting as the agent of Mrs.

McQuown, and continued the employment of plaintiff, and continued to pay plaintiff the same rate per day he had previously contracted to pay; and at no time did McQuown, while so acting as agent, directly or indirectly intimate to plaintiff a change in the terms of the contract. On the contrary, his act as agent, in continuing payment under the contract, was the act of his principal, Mrs. McQuown; thus rendering the testimony relative to the original contract admissible to show the terms of his employment, after she succeeded to the business.

The second and last assignment of error is to the instruction of the court, and is as follows: "If you find from the evidence that payments were made to the plaintiff at the rate of \$3.50 per day for work that he did for her after she took charge of the business, this will be testimony tending to establish an employment by her at the rate of \$3.50 per day."

It appears from the record that the instructions of the court were six in number, but the remaining instructions are not embraced in the transcript or abstract of record. The ground of the objection is that, by the instruction above recited, the court singled out and gave undue prominence to certain facts, ignoring other facts proved, of equal importance. The rule of this court is that, in construing a charge to the jury, each instruction is to be considered in connection with the entire charge, and if, considering the charge as a whole, this court is satisfied the jury were not improperly advised as to any material point in the case, and that, reading each instruction in connection with the others, they were not misleading, the judgment will not be reversed on the ground of erroneous charge. *Finerty v. Fritz*, 6 Colo. 136.

This case has been followed by a number of others in this court, and it will be readily seen that, inasmuch as appellant did not embrace within the transcript or ab-

stract the entire instructions given by the court to the jury, we are unable to construe the charge as a whole, and determine whether or not the jury could have been misled by the foregoing instruction, even were it objectionable,—a matter we do not pass upon.

There being sufficient evidence to support the verdict, the judgment should be affirmed.

REED and PATTISON, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

Affirmed.

SILVER CORD COMBINATION MINING CO. v. McDONALD.

1. NEGLIGENCE OF MINING COMPANY — RIGHT OF EMPLOYEE TO RECOVER DAMAGES FOR INJURIES OCCASIONED BY REASON THEREOF.—

Where a mine is operated by a company through an incline extending from the surface several hundred feet into the earth, by means of cars run upon iron rails laid therein, and it is an established rule of the company that a signal called a "tally" shall be sounded at twenty-three minutes before 5 o'clock every evening, at which time the cars shall cease running up and down the incline and the workman shall have the right of way for the space of seven minutes to reach the surface, it is negligence on the part of the company to permit a car to go down the incline after the "tally" is sounded, and a miner injured thereby is entitled to recover damages.

2. ESTOPPEL BY CONDUCT.—Defendant, through its negligence, having put plaintiff in a position of danger, could not complain that he did not exercise cool presence of mind in his endeavor to escape therefrom.

Appeal from District Court of Lake County.

Mr. CLINTON REED, for appellant.

Messrs. TAYLOR & ASHTON, for appellee.

RICHMOND, C. Appellee, plaintiff below, brought this action to recover damages for injuries alleged to have

14	191
20	139
14	191
15a	222

been sustained by him while in the employ of the defendant company. The cause was tried to a jury, and verdict rendered in favor of plaintiff for the sum of \$2,250. Motion for a new trial overruled. Appeal prayed and allowed. The assignment of errors are to instructions given and refused, and in rendering judgment for plaintiff upon the verdict, and that damages are excessive.

The facts, in substance, are that appellant was a corporation engaged in mining at Leadville, employing upwards of one hundred men, who worked the mine through an incline about eight hundred and thirty-five feet in length. Iron rails were laid along the incline, over which the company drew its cars. Along this incline, on one side, was a passage-way over which was constructed a plank walk. About seven hundred feet down the incline was a station called "No. 2." It was a rule of the company that after "tally," which was expected to occur at twenty-three minutes past 5 o'clock, the cars should cease to run up and down the incline. Miners were allowed seven minutes to reach the surface after tally. An air-pipe extended from the surface to station No. 2, and the man at the top, or foreman, at twenty-three minutes past 5 o'clock, rapped on this air-pipe, or was supposed to do so. This was called "tally." The foreman, who had charge of the mine, and who, as the evidence shows, had authority to hire and discharge men, instructed the man at station No. 2, Thomas McNicholas, that when this signal was not given from the top he was to tally the men, anyhow, at twenty-three minutes past 5 o'clock.

On the day the injuries were received, plaintiff, in passing up the incline, was met by a car going down, and in the excitement attempted to jump across the track at a place, as he thought, of greater safety, and in so doing received the injuries for which he seeks to recover damages in this action.

It is contended by appellant that the rule of the company was that none of the employees engaged in the

mine should attempt the ascent until tally had been given by rapping on the pipe; that this rule was absolute; and that on the day the injuries were received the signal had not been given; therefore the plaintiff, in attempting the ascent of the incline, was violating the rule of the company — consequently, was guilty of contributory negligence. On the other hand, the plaintiff contends that the rule was not absolute, in fact was frequently violated by the defendant, and that the injuries were the result of its negligence in sending a car down the incline during the seven minutes allowed to the miners to reach the surface, and that on the day the injuries were received the man (Thomas McNicholas) stationed at station No. 2 gave the tally to the men before they attempted to ascend the incline.

The defense relied upon by appellant is that there was contributory negligence on the part of plaintiff in violating the rule of the company. It is insisted in the argument of counsel for appellant that no testimony appears showing that a tally had been given before plaintiff, with others, attempted to ascend the incline.

This position assumed in the argument is not supported by the record furnished by appellant. Some dispute arose between counsel for the respective parties as to the testimony of Thomas McNicholas, a witness sworn on behalf of defendant; and, in order that this court might be fully informed of what McNicholas did swear to, appellant furnished a complete abstract of his testimony. From that it appears that McNicholas testified as follows:

“Question. Now, what do you know? Explain to the jury about quitting time of the men, and about the rules of the company, — when they should quit, and what signal was given them to quit. *Answer.* The men had orders that they should have seven minutes — that is, from twenty-three minutes after 5 — to go from No. 2 station, where I was stationed, to the top, before the

whistle blew. They had a signal on top,—that the engineer on top would rap at twenty-three minutes after 5, and if he did not the top man there would rap on the air-pipe. I think it was seven minutes for tally. If that was not rapped,—the foreman of the mine told me that, when that was not rapped in time, as long as I had my watch, and knowed the time, to tally the men, and let them go to the top. Q. How was it on this day that the accident happened? A. This day, I do not think the pipe was rapped at the regular time. If there were any men there at that time, I tallied them. I do not think there was many there. Q. And then, when you were waiting there for the drop to come down, to send another to the surface, had the tally commenced to run,—that is, the seven minutes? Was it tally at that time? A. It was. *Cross-examination.* Q. You say you gave the tally to some of the men there that night? A. I gave the tally to all of them that was there. Q. You gave to all that were there? A. Yes, sir; I do not remember whether the plaintiff was there or not. Q. Now, did you notify any of them that there was a train going down the incline at the time they started up, or at the time they were starting up? A. I believe not. Q. Did you ever tally the men before the time for tally came? A. No, sir. Q. And then the men that you tallied this evening were started at the proper time, were they? A. Yes, sir."

This witness gave further testimony to the same import; but it is unnecessary for us to quote more, as sufficient appears from the above to show that plaintiff was in the incline, on his way to the surface, under the rule of the company, as understood by this witness.

Several witnesses testify in behalf of plaintiff, and support the testimony of McNicholas as to the time, etc. Plaintiff testified that "the regulations of the company was that we were allowed seven minutes to come out; that they were supposed to be on top at 5:30. They

would sometimes tap on the pipe when it was time for us to come up. They did not do it always. The time I was hurt, I was about two hundred or two hundred and fifty feet from the mouth of the incline. It was twenty-three minutes past 5 when we started up the incline."

It may be true, as claimed by the attorney for appellant, that the rule was that tally should not be given until the signal was rapped by some person on the surface of the mine. Yet it is equally true that the company did not at all times observe the rule. At least, it can consistently be claimed that ample evidence appears in the record to warrant the belief that this rule was not strictly adhered to. Undoubtedly the company sought to adopt proper rules and regulations concerning the time when the miners should have a right of way through the incline. Having adopted them, it should have conformed to them; and, failing to do so, it must be held responsible for the consequences resulting from a departure, unless contributory negligence on the part of plaintiff is established. *Railroad Co. v. George*, 19 Ill. 510.

Besides, under the circumstances as detailed by all of the witnesses in the case, we think such a rule as is here contended was in force by appellant should have been strictly enforced. No departure from it should have been tolerated. It was necessary to the welfare of the miners. McNicholas, at station No. 2, could not possibly know when the cars would be sent down the incline by the engineer at the top; and allowing him to give the tally, in violation of the rule, without such knowledge, was subjecting the miners to an extraordinary risk, and was an act of negligence on the part of the company.

In general, questions of negligence and contributory negligence are questions of fact, to be determined by the jury from the evidence and circumstances of the case, under suitable instructions. They cannot ordinarily be decided by the court. Hence, it was the province of the jury to pass upon those questions in this case. *Railway*

Co. v. Ward, 4 Colo. 30; 2 Thomp. Trial, § 1681; *Railway Co. v. Harper*, 26 Ill. App. 621.

Counsel for appellant urges that plaintiff, in attempting to cross the track at the time the car was descending the incline, was guilty of contributory negligence, and therefore cannot recover. This question was fairly submitted to the jury by an instruction, and resolved by them favorably to plaintiff. Similar positions and circumstances have several times been presented for judicial investigation as involving the question of contributory negligence, and, it must be admitted, have been variously construed. But the rule which commends itself to our approbation, as resting on sound principles of humanity, is to the effect that "a party giving another a reasonable cause for alarm cannot complain that the person so alarmed has not exercised cool presence of mind, and thereby find protection from responsibility for damages resulting from the alarm, when he is guilty of negligence or violation of law contributing to the injury." *Coal Co. v. Healer*, 84 Ill. 126; *Collins v. Davidson*, 19 Fed. Rep. 83.

It is urged that the court erred in refusing to give the eleventh and twelfth instructions asked for by appellant. The eleventh instruction was fully covered by the fifth and eighth instructions given; and, indeed, we are inclined to the opinion that the language used by the court was decidedly more favorable to the defendant than that embraced in the eleventh instruction as asked, and, under the rule laid down in *McKee v. Mining Co.* 8 Colo. 392, it was not error to refuse to give it.

In refusing to give the twelfth instruction as asked, there was no error, for the reason that there was no testimony offered on the part of defendant tending to prove that the injuries for which recovery was sought occurred through the negligence of a servant of the defendant; nor was such a claim, so far as the record discloses, interposed during the trial of the cause. The defendant relied

at the trial, as in this court, upon the ground of plaintiff's contributory negligence, as its defense.

It is also contended that the court erred in instructing the jury that it is not negligence to commit an error under the influence of fear produced by the appearance of sudden danger, and also that there was error in instructing to the effect that if the defendant, through its negligence, put the plaintiff in a position of immediate danger, real or apparent, and that plaintiff, through a sudden impulse of fear, attempted to escape the danger, and in so doing actually received the injury he was attempting to escape, then he may recover. We cannot agree that these objections are well taken. On the contrary, we think the instructions substantially correct, under the evidence and circumstances of the case. *Coal Co. v. Healer, supra.*

As to the question of damages, the jury were fairly and properly instructed. Ample testimony appears to show that the injuries of plaintiff were permanent; and it is utterly impossible for us to say, under the circumstances, that plaintiff, thus permanently injured, was not entitled to the amount mentioned in the verdict of the jury.

True it is that it was a question between the physicians who testified on the part of plaintiff and defendant as to whether the injuries received were of a permanent character. But it is fair to assume that the jury found that the injuries were of that character, and upon such finding based the amount of damages. The witnesses were before them, and apparently without any interest, directly or indirectly, in the result of the cause. Each were equally entitled to credit; and, in this case, "when the doctors disagree," we think it was for the jury to decide. The instructions of the court were full, and in keeping with the doctrine as announced in *Wells v. Coe*, 9 Colo. 159.

We are therefore unable to escape the conclusion that

the cause was fairly and impartially tried, the jury correctly instructed upon the law of the case, and that the evidence is sufficient to support the verdict.

The judgment should be affirmed.

PATTISON and REED, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

Affirmed.

HALLACK ET AL. V. STOCKDALE ET AL.

APPEAL — WEIGHT OF EVIDENCE.— Where the questions in a case are purely of fact, the supreme court will not interfere with the verdict of the jury when there is evidence to warrant its findings.

Appeal from District Court of Arapahoe County.

Messrs. DECKER & YONLEY, for appellants.

Messrs. BROWNE & PUTNAM, for appellees.

REED, C. This was an action of trespass for cutting timber, in which treble damage was claimed, under section 2468, page 738, General Statutes. Appellees, plaintiffs below, were the owners of about one thousand four hundred and twenty acres of land in Park county, covered more or less with timber, and alleged in their complaint that the defendants, without leave of plaintiffs, and without lawful authority, entered upon the land, cut and carried away two thousand five hundred timber trees of the value of \$3,000,—praying judgment for \$9,000.

The answer was specific denial of all the allegations in the complaint. The case was tried to a jury, and verdict found for the plaintiffs, and judgment for \$2,856 against the defendants Erastus F. and Charles Hallack.

14	198
16	231
14	198
18	77
14	198
20	69

Morris was not served, and did not defend, and no judgment was taken against him.

There are several errors assigned. The first to tenth, both inclusive, and the twelfth are upon the alleged admission of improper testimony to prove the appellants' connection and their relations with Morris, and their consequent liability to the plaintiffs for the alleged injuries. These supposed errors are neither argued nor discussed in the argument for appellants, and may be regarded as having been waived.

Neither upon the trial nor in argument was the question raised whether the case was one, if made, that entitled plaintiffs to treble damages, under the statute. That it was within the intention and purview of the statute appears to have been conceded. In the opening paragraph of their argument, counsel for appellants say: "The facts are that John Morris was running a saw-mill near the appellees' land, and had cut from two thousand eight hundred to three thousand trees from their lands, and had sawed them into lumber, and a great portion of the lumber had been shipped to Erastus F. Hallack by Morris."

They also say, on page 2 of their argument: "There were no exceptions on the trial to the instructions of the court to the jury by either party; and we are of the opinion that the instructions stated the law clearly and correctly, and, if the jury had heeded them, there would have been a verdict for the appellants."

The facts conceded in the first paragraph, and the admission of the correctness of the instructions of the court as to the law covering the case, greatly simplifies the examination; and, under the remaining errors assigned, the controversy is narrowed to two questions: *First*. Was the jury warranted, under the evidence, in finding the relations existing between appellants and Morris such as to render appellants liable for the destruc-

tion and conversion of the timber? *Second.* Were the damages excessive?—both purely questions of fact.

It must be conceded that the testimony was contradictory; much of it vague and undeterminate; but there was testimony upon which the verdict, both as to the liability of appellants and amount of damage, might properly be predicated. It cannot be said there was not evidence to support it, nor can it be said that the verdict was greatly against preponderating evidence.

It is a well-settled rule of this court, as well as of all courts of appellate jurisdiction, and a cardinal principle, that the jury is the final and only tribunal to determine questions of fact, and that where facts are so found the finding will not be disturbed by the appellate court, unless misinstructed by the court, or the verdict is so palpably incorrect as to show bias, prejudice, or a wanton disregard of the duties and obligations of jurors; and this rule is well established in, and sustained by, reason. Jurors, before whom witnesses are brought, and the judge of the trial court, being confronted with the witnesses, have opportunities of judging, from their personal appearance and manner of giving their testimony, of their credibility, which the appellate court cannot have. It is the experience of every trial judge and lawyer that the weight of evidence does not depend upon the number of witnesses testifying to a particular fact, but upon the character and disinterestedness of the party. In many cases the testimony of several characterless witnesses, evidently employed for the occasion, or swearing in their own interest, might be overcome by the testimony of one disinterested man of known probity and integrity, and these discriminations are peculiarly within the province of the jury, who may, from their opportunities and the attending circumstances, utterly disregard testimony that might, when incorporated into the record unimpeached, be considered by the appellate court as controlling.

Another cogent reason for the strict adherence of appellate courts to the rule above laid down is the fact that the trial judge, having the same opportunities for observation as the jury, can determine whether the jury are honestly and conscientiously performing their duty; and, if he is of the opinion that they are not, and that the verdict was the result of bias and prejudice, and made in disregard of duty, he can at once set it aside, and order a new trial. Where, as in this case, the questions are purely of fact, and the jury being the only tribunal for their determination, appellate courts will not interfere, where there is evidence to support the verdict.

In this case there was evidence to warrant the findings, both as to the liability of appellants and the amount of damage. The verdict in the case was for the amount before stated. There is nothing to show whether the jury found it as actual or triple damage. The court very properly required counsel to stipulate that it should be taken as treble damages, under the statute, or, in other words, that the sum should be taken as full satisfaction. If it had been taken as the amount of actual damage, it might have been considered excessive if trebled, which it is conceded plaintiffs might recover. Taken as triple damage, it must be, under the evidence, regarded as moderate, and fully warranted. The judgment should be affirmed.

RICHMOND and PATTISON, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

Affirmed.

COORS V. GERMAN NAT. BANK.

1. NEGOTIABLE INSTRUMENTS—BONA FIDE PURCHASERS.—Where A. indorses drafts in blank to B. for collection, and B., wrongfully assuming to be the owner, sells and disposes of them to C., who has no knowledge of the want of ownership in B., C. is invested with good title, so as to retain the proceeds as against A.
2. C. is not chargeable with notice of ownership in A. by the fact that in B.'s letter, sending the drafts to C., they were described as "A.'s acceptances."

Appeal from Superior Court of Denver.

ACTION by the German National Bank of Denver against Adolph Coors, to recover the amount of a thousand-dollar note executed by defendant and discounted by plaintiff. There was judgment for plaintiff, with allowance of certain offsets. Defendant appeals.

L. S. DIXON, for appellant.

PATTERSON & THOMAS, for appellee.

REED, C. Coors, the appellant, who was defendant below, was, and for many years had been, a brewer at Golden, Jefferson county. His sales were mostly by carlots or large quantities, shipped to various parties, and sold on time. It was his custom on the shipment to fill an order to draw a draft payable to his own order, and, at the expiration of the time of credit given, send the draft to the consignee for acceptance, to be returned to him. F. E. Everett was a private banker at Golden, and had been for many years. In July, 1884, he died insolvent. He kept an account and transacted business with appellee in Denver, and acted as agent and correspondent of appellee at Golden. Appellant Coors transacted his business and kept his account with Everett until the time of his death. His accepted drafts, when returned to him, were by him indorsed in blank, and deposited with Everett; the proceeds to be placed to his

credit when collected. When in need of money he made his notes payable to Everett, by whom they were discounted. It appears that Everett was in the habit of rediscounting these notes with appellee, which fact was not known to Coors; and, as appellee was in the habit of transmitting the notes at maturity to Everett for collection, Coors did not, necessarily, know that the notes had been rediscounted.

On the 26th of March, 1884, Coors made his note to Everett for \$1,500, payable ninety days after date, with interest. On the 8th of May, Coors made a note for \$1,000, with interest, payable to Everett sixty days after date, which was the note on which this suit was brought. Both notes were indorsed in blank by Everett, and rediscounted for him by the appellee. After the death of Everett, Coors opened an account with the appellee. On the 8th day of May, 1884, Coors drew a draft on Keppler & Co., of Leadville, payable at sixty days, for \$471.90. On the 21st of May he drew a second draft on Keppler for the same amount, at sixty days. On the 27th of May he drew his draft on Dyer & Northington, of Rawlins, Wyo., for \$748.25, at sixty days. On May 14th he drew his draft on Crystal Bros., Pitkin, Colo., for \$228, at seventy-five days,—all of which drafts were accepted by the drawees, returned to Coors, indorsed by him in blank, and deposited with Everett for collection. The drafts above described amounted in the aggregate to \$2,131.12. The drafts were not discounted by Everett, nor passed by him to the credit of Coors.

On the 24th of June, when the two notes of Coors for the sums, respectively, of \$1,500 and \$1,000, were nearing maturity, Everett applied to appellee to have the Coors drafts above described, and perhaps others, discounted to meet the maturing notes. On the 27th of June an interview was had on the same subject, at which appellee declined to discount drafts to meet both notes, but discounted drafts on Crystal Bros. for \$228,

Keppler's draft of May 21st for \$471.90, and draft on Dyer & Northington for \$748.25, to pay the note of \$1,500. The note, having been paid by Everett to appellee, was returned to Everett; and Coors, knowing nothing of the discount of his drafts by Everett to pay the note, and having no knowledge of the rediscount of the note by appellee, paid the same to Everett. The other drafts, not discounted, were left with appellee for collection. When collected, the proceeds were to be put to the credit of Everett. At the time of Everett's death, the note of Coors for \$1,000 was unpaid in the hands of appellee. There was at that time, or afterwards, a small balance in its hands, the proceeds of collections of Coors' drafts, to the credit of Everett. At the time of the bringing of this suit there was also in the hands of appellee a small balance to the credit of Coors. This suit was brought to recover the amount of the \$1,000 note. The defendant pleaded payment, and set up as counterclaims the amounts received by appellee on each of the above-mentioned drafts of Coors, collected by appellee. The case was tried by the court without a jury, who allowed as offsets the balance of proceeds of the Coors drafts to the credit of Everett in the hands of the appellee, and the balance on the account of Coors in the bank to the credit of Coors; leaving a balance on the note of \$364.18, for which appellee had judgment.

There was no serious dispute in regard to the facts. It was not claimed that Coors had any knowledge of the rediscounts of the notes made by Everett with appellee, nor the transfer and discounts of his drafts left for collection with Everett; nor is it claimed that appellee had any actual notice or knowledge that Everett was not the owner of the drafts of Coors.

The contention for Coors is—*First*. That under the circumstances proved, as above stated, appellee could not acquire title to the drafts. *Second*. That by the language used in the letters of Everett in regard to the

Coors drafts, appellee was notified, or should have been, that they were not the property of Everett, but of Coors. The language relied upon was as follows:

"Golden, Colo., July 8th, 1884. W. I. Jenkins, Esq., Cashier, Denver— Dear Sir: I advise Cr. to-day of 15844, A. Coors, due Ju. 27, \$1,500, int. \$5, \$1,505. Of the list of collections left with you of his, amt'g \$2,617.05, \$697 has been paid, & placed to Cr. my ac.," etc.

Also of July 12: "I note disc'ts Coors, \$1,438.55, from list, leaving our 20144, \$471.90, due 10th, and extended five days as a collection for Cr. when paid."

And from a memorandum made by Everett, and handed Jenkins, cashier of appellee, dated June 27th, on which Everett had written: "Discount A. Coors accept'cs, coll'n No. 20144. Rem. June 6th, Keppler & Company, Leadville, due June 23 & 26th, \$468.75," etc.

We do not think the position of counsel on this last point tenable, and that there was anything in the language used by which appellee could be informed of anything in regard to the ownership of the drafts. It can only be regarded as description to designate the paper. We can find no authority, and none is cited by counsel, where it is held that any such descriptive language can be construed to indicate ownership; and certainly no such inference could arise when Everett was the holder of them, properly indorsed without limitation, and dealing with them as his own.

The only question to be determined is whether Coors, having indorsed the drafts in blank to Everett for the purpose of having them collected and the proceeds placed to his credit, and Everett, wrongfully assuming to be the owner, could sell and dispose of them, and appellee, without knowledge of the want of ownership in Everett, could be invested with good title, so as to retain the proceeds as against Coors. It is a well-settled rule of law that one who acquires negotiable paper, in the usual course of business, before maturity, in good faith, for a

valuable consideration from one capable of transferring the same, becomes a *bona fide* holder, and takes it divested of all prior equities. See sec. 4, ch. 1, Code. And it has been so held in this court. *Wyman v. Bank*, 5 Colo. 80, and *Bank v. McClelland*, 9 Colo. 608.

It is contended by the able counsel of appellant that "it was the duty of the bank proposing to purchase from Everett to have sought Coors and ascertained from him whether Everett had any authority to sell or not." This is not in harmony with the law or the decisions of this court. In *Bank v. McClelland*, *supra*, it was said by the present chief justice, at page 610: "If there is nothing upon the face of a negotiable instrument or in the written indorsement or assignment to notify the assignee that the instrument was originally given upon an illegal consideration (gambling debts excepted), or obtained through fraud, the assignee who pays value therefor, and takes the same in good faith before maturity, may recover as against the maker. This is true, even though such assignee be in possession of facts or circumstances sufficient to arouse suspicion in the mind of a person of ordinary prudence, and though he is guilty of negligence in not first following up such information, for the purpose of discovering the fraud or illegality to which the suspicious circumstances may seem to point."

The rule adopted in this court is that of the federal courts and a majority of the states. See *Bank of Metropolis v. New England Bank*, 1 How. 234, 6 How. 212; *Swift v. Smith*, 102 U. S. 442; *Hotchkiss v. Banks*, 21 Wall. 354; *Murray v. Lardner*, 2 Wall. 110; *Brown v. Spofford*, 95 U. S. 474.

We are aware that in the state of New York, and some other states following its decisions, the rule as adopted in this state is considerably modified. But the federal rule, as here adopted, appears to be the better rule, better founded in reason, and necessary in the interest of commerce, that requires that such paper should be allowed

to pass from hand to hand with the greatest freedom possible consistent with safety; and it works no injustice to the owner of paper to say that he shall be held responsible for his own acts, and not an innocent party who has been misled by them.

Coors could by a word have limited his indorsement so as to protect himself and others. That he failed to do so was not the fault of appellee, but his own, and he must suffer the loss according to a principle so well known that a repetition here is unnecessary. The judgment should be affirmed.

PATTISON and RICHMOND, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

Affirmed.

HURD V. PEOPLE.

CONTEMPT OF COURT—REFUSAL OF RECEIVER TO EXECUTE A DECREE

APPEALED FROM.—The taking and perfecting of an appeal under the act of 1885 (since repealed) by the filing of the bond required by section 28, page 354, from a decree dissolving a temporary injunction, and ordering the receiver to deliver over possession of the property involved to the persons entitled thereto under the decree, operated as a *supersedeas* and stay of process and proceedings as to every part of the decree. The trial court being thus ousted of all power to enforce it, the receiver was not in contempt for declining to execute it pending the appeal.

Error to District Court of El Paso County.

Mr. L. C. ROCKWELL, for plaintiff in error.

Attorney-General THEO. H. THOMAS and Attorney-General ALVIN MARSH, for the people.

REED, C. This was a proceeding before the Honorable William Harrison, judge of the district court of El Paso

14	207
1a	206
2a	338
14	207
23	36
14	207
19a	364
14	207
35	13

county, against the plaintiff in error for an alleged contempt of court.

On November 2, 1885, plaintiff in error was appointed receiver in a certain proceeding in equity concerning mines and mining property in the county of Park, wherein George C. Bates and Mary Barker Bates were plaintiffs, and Alfred H. Wilson, Randall W. Wilson and the Woodmas of Alston Mining Company were defendants. By the order of appointment he was to have the sole and exclusive possession of a mining claim and of other property in controversy, work the property, and transact all the necessary business, which he did from the date that he qualified until the 26th day of June, 1886, when the litigation was ended in the court. At that time he had in his hands, as receiver, the proceeds of the mine, amounting to over \$19,000. On the last-named date a decree was entered as follows:

"The temporary injunction heretofore issued is dissolved, and the receiver is ordered and required to surrender and return to defendants Alfred H. and Randall W. Wilson, or their authorized agent, full, quiet, peaceable and undisturbed possession of the premises mentioned in the pleadings, and also all books, maps, documents and other personal property in his possession as receiver; the possession of said mine to be yielded to Wilsons on the 8th day of July, 1886, at 12 o'clock high noon of that day; and on the same day that the receiver pay to defendants Wilsons, out of the moneys now in his hands, the sum of \$16,000, the remainder to be left in his hands, amounting to some \$3,400, to be kept as a fund for the payment of the expenses of said receivership; that the receiver report to this court on July 16, 1886, in what manner he shall have executed this order; that this cause shall stand continued for the purpose of retaining jurisdiction of the receiver, and for the purpose of hearing and acting upon his final report, and that in all other respects this cause shall stand dismissed."

On the 6th of July, two days before the date fixed in the decree for the surrender of the property and the payment of the money by the receiver, an appeal was perfected to this court, and bond filed in the sum of \$16,000. Of the amount in his hands, the receiver paid over to the defendants \$8,000, and, by the advice of counsel for plaintiffs, refused to pay over the other \$8,000, and deliver the possession of the property to the defendants.

Upon the 2d day of September, 1886, plaintiff in error was cited before the honorable judge in chambers, in vacation, to answer to a charge of contempt for failing to pay over the remaining \$8,000 in money, and deliver the possession of the property; was found guilty, and fined \$100. He then sued out this writ of error to have the proceeding reviewed in this court.

The question presented to be determined is, Had the district court jurisdiction after the appeal was perfected? In the suit of *Bates v. Wilson et al.*, ante, page 140, in which plaintiff in error was appointed receiver, the question in controversy was whether plaintiffs were joint owners with the defendants in the property, the interest claimed by plaintiffs being one-half, and naturally or incidentally involved were the questions of right of possession and joint occupancy of the plaintiffs, and the right to share in the money in the hands of the receiver. By the decree it was ordered that the plaintiffs take nothing, and that the suit be dismissed, except that jurisdiction be retained for the receiver to perform the decree, and have his accounts passed. To perform the decree the receiver was to deliver complete possession, and pay over to defendants all moneys in his hands, save the sum thought necessary to pay the expenses of the receivership. The decree was entire, and from the decree the appeal was taken. The appeal in this case was taken under and controlled by the statute of 1885 (see Sess. Laws, p. 350, § 2), which statute has since been repealed. The decree, although, as above stated, entire, was dual

in character, but was all covered by the appeal; subdivision 2 of the section above cited being that an appeal will lie from "a final order made in any special proceedings affecting a substantial right therein, or made in a summary application in an action after judgment."

A wide distinction is made in proceedings where the supposed contempt is wilful and contumacious, or growing out of some matter incidental to or ancillary, as in cases of this kind, where the supposed contempt grew out of the refusal to obey an order which was, or reasonably might have been, considered by the receiver and his counsel as a process in the execution of the decree from which the appeal was taken.

If the appeal and the filing of the bond operated as a *supersedeas*, then it of necessity stayed all process and proceedings to carry into effect the decree from which the appeal was taken. That the taking of the appeal, filing of bond, as in this case conditioned, to cover the entire case from which an appeal will lie, operates as a *supersedeas*, cannot be successfully questioned. The conditions of the bond were such as were required to make the appeal a *supersedeas*, as required by statute. Sess. Laws 1885, § 23, p. 354. It also appears from the record that the bond was approved, and that the clerk issued the written order commanding the stay of proceedings, as required in the latter part of the section above cited. In this case the appeal bond was executed and filed for the express purpose, and immediately operated as a stay and *supersedeas*, under the statute. See *Daniels v. Miller*, 8 Colo. 542. Under the New York code, which is very similar to ours, in *How v. Searing*, 6 Bosw. 684, Woodruff, J., said: "By the express terms * * * of the code, the perfecting of an appeal * * * by giving the undertaking mentioned * * * shall stay all proceedings in the court below upon the judgment appealed from. If, therefore, this motion is a proceeding 'upon the judgment,' the motion is improperly and irregularly made; for as to all such proceedings the

plaintiff's hands are tied, and if an attachment and a commitment thereunder for disobeying the judgment appealed from, while the appeal is pending, are 'proceedings upon the judgment,' then the motion therefor cannot be granted, for not only the action of the plaintiff, but the action of the court therein, is stayed pending the appeal."

It also appears from the record that the appeal was perfected, the bond filed, and the *supersedeas* effective two days before the receiver was ordered by the decree to perform the acts the failure to perform which was punished as contempt. The practice in chancery, before the modification by statute, did not allow an appeal from an order granting or dissolving an injunction. *Hart v. Mayor*, 3 Paige, Ch. 380; *Graves v. Maguire*, 6 Paige, Ch. 379.

By our statute (Sess. Laws 1885, subd. 3, § 2, p. 350) an appeal will lie "when an order grants or refuses, continues or modifies, a provisional remedy, or grants, refuses, dissolves, or refuses to dissolve, an injunction." The decree being general,—an entirety,—the appeal lay from, and the stay by *supersedeas* reached, every part of the decree appealed from. In *Graves v. Maguire*, *supra*, it is said: "The effect of an appeal, after the proper steps have been taken to render it a stay of proceedings upon the order or decree appealed from, is to leave the proceedings in the same situation as they were at the time of perfecting such appeal." Such being the effect, the acts required of the receiver, to deliver the possession, pay over the money, etc., were acts in the process of the execution of the decree, and were forbidden by the *supersedeas* as incidental to the decree.

The district court, by the appeal, was ousted of all authority to enforce by itself, or its agent, the receiver, any branch or portion of the decree; and the decree, having been appealed from, was, until reviewed in this court, as inoperative as though it had never been entered,—the effect of the appeal being, as has been shown,

to maintain the *status* of affairs in exactly the same condition as they were at the time of perfecting the appeal.

The right and power of the district court to punish as for a contempt the disobedience of its officer for failing to enforce the decree, presupposes and involves the existence in the court of the right to enforce any and every part of the decree. The appeal was taken and the bond given to prevent the delivery of the possession and payment of the money, as much as to review the decision of the court in regard to the rights of the parties. Had the receiver delivered the money and the possession of the property, and this court had found the money to belong to plaintiffs, and had found them co-owners in the property, and entitled to joint possession, it might have been impossible to recover the money; and in property of this kind, where the value is only in the ores contained, the mine might have been depleted and the freehold destroyed; and the plaintiff would have been compelled to stand by without remedy, and see the whole subject-matter of the controversy destroyed, during the long time pending the appeal, and, if in the end successful, obtaining, at great expense, a barren victory. We are aware that proceedings for contempt are not considered proceedings in the action, but are special proceedings; as regulated by the code. The right to punish for contempt is inherent in every court, and necessary to a due administration of the law; but the court, by reason of the appeal and *supersedeas*, being without authority to enforce its decree, the receiver was not in contempt for declining to execute it.

The judgment of the district court should be reversed, and the proceeding dismissed.

RICHMOND and PATTISON, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is reversed, and the proceeding ordered dismissed.

Reversed.

HURD V. McCLELLAN ET AL.

1. CONSTRUCTION OF STATUTES AND CONTRACTS — APPLICATION THERETO OF THE PRINCIPLE OF NOSCITUR A SOCIIS (Civil Code, 1883, § 95, subd. 14).—The code provision that “in all actions brought upon overdue promissory notes, bills of exchange, other instruments for the direct payment of money, and upon book-accounts, the creditor may have a writ of attachment issue upon complying with the provisions of this section” (Civil Code, 1883, § 95, subd. 14), in so far as it relates to written contracts is to be limited to contracts of the nature of those specified therein.
2. A WRIT OF ATTACHMENT MAY NOT ISSUE UPON AN APPEAL BOND.—An appeal bond conditioned that if the defendant shall duly prosecute his appeal and pay the judgment if the same shall be affirmed, then the obligation shall be void, otherwise it shall remain in full force, is not a written instrument for the direct payment of money, and will not sustain an attachment.

Appeal from District Court of Arapahoe County.

Mr. W. T. HUGHES, for appellant.

Mr. R. S. MORRISON, for appellees.

PATTISON, C. It appears from the abstract of record and arguments in this case that on April 27, 1885, appellant recovered a judgment against Job C. McClellan, one of the appellees, for the sum of \$4,437 and costs. From this judgment an appeal was taken and an appeal bond filed, with the other appellees as sureties, which contained the following condition: “Now, if the said Job C. McClellan shall duly prosecute said appeal, and, moreover, pay the amount of said judgment, costs, interests and damages, rendered and to be rendered against said Job C. McClellan, in case the said judgment shall be affirmed by the said supreme court, then the above obligation to be null and void, otherwise to remain in full force and virtue.”

On April 9, 1886, the appeal was dismissed for failure to file transcript, etc. Thereupon this action was brought upon the appeal bond, and an attachment issued. Motion

was made to quash the writ because "(1) no attachment lies upon an appeal bond; (2) an appeal bond is not a written instrument requiring the direct payment of money."

The court sustained the motion and dissolved the attachment. From this order this appeal was taken.

The sole question to be determined by this court is whether an appeal bond containing the condition above recited is a written instrument for the direct payment of money, within the meaning of subdivision 14 of section 95 of the Code of Civil Procedure.

Appellant contends that the provision cited was borrowed from California, and the supreme court of the state has decided an attachment will issue in aid of a suit brought upon an appeal bond. He invokes the principle that whenever a statute is adopted from another state the construction given to that statute by the courts of that state is also adopted. The principle is correct as a general rule (*Stebbins v. Anthony*, 5 Colo. 348); but the premises upon which appellant predicates his proposition are erroneous. The fourteenth subdivision of section 95 of the code was enacted in 1881 as an amendment to the original statute. It created a new substantive cause for attachment. It reads as follows: "In all actions brought upon overdue promissory notes, bills of exchange, other written instruments for the direct payment of money, and upon book-accounts, the creditor may have a writ of attachment issued upon complying with the provisions of this section."

The provision of the California code to which reference is made reads as follows: "In an action upon a contract, express or implied, for the direct payment of money, where the contract is made or is payable in this state," etc. Harst. Pr. § 538.

The language of the two sections is in no sense similar. This provision cannot be said to have been adopted from California. The question of construction, therefore, is an original one.

The meaning of the words "other written instruments for the direct payment of money" should be construed in connection with the context. Other instruments are specifically mentioned. It is clear that the statute was intended to apply to instruments of the nature of those specially mentioned. Such instruments are overdue promissory notes and bills of exchange. These are, manifestly, instruments for the direct payment of money. The payment provided for is absolute and unconditional. In other words, it is direct. In this case the obligation assumed by the sureties was not direct, but collateral. They could be charged only upon failure of the principal to pay. If he failed to pay the judgment appealed from, if affirmed by this court, then there would be a breach of the condition of the bond upon which a cause of action might be predicated.

Commenting upon this section in the case of *People v. Boylan*, 25 Fed. Rep. 594, Hallett, J., says: "In respect to the manner of payment, promissory notes and bills of exchange are distinguishable from many other contracts in that they are for a definite sum of money, payable absolutely at a specified time. Upon the principle *noscitur a sociis*, the 'other instrument' mentioned in the statute should be of the class of promissory notes and bills of exchange, in respect to the quality of direct payment. Inasmuch as the word 'overdue' in the statute is applicable to the other instruments as well as to promissory notes and bills of exchange, such instruments must be of a character to become overdue, and an instrument of that character must be for a fixed sum, payable absolutely at a time specified." That action was brought upon an administrator's bond, and it was expressly held that such bond was not an instrument in writing for the direct payment of money. It is true that the condition of an administrator's bond is not the same as that of an appeal bond, yet the reasoning of Judge Hallett in the case cited is clearly applicable to this case.

Appellant relies principally on the case of *Hathaway v. Davis*, 33 Cal. 162. By a divided court it was held that "an undertaking on appeal is an express contract for the direct payment of money, in the sense of the statute in relation to attachments." The opinion of the majority of the court is vague and unsatisfactory. In a dissenting opinion, Sawyer, J., uses the following language: "This appears to me to be an undertaking that another party shall pay, and not that the party himself will pay. There is no promise that the defendants themselves will pay any money at all, and consequently no contract on their part for the direct payment of money. On a failure of the appellants in the suit to pay in accordance with the terms of the undertaking, there is a breach, it is true, and the party to the undertaking is liable for damages for the breach. But the liability is strictly for damages, and not on his own contract that he himself will pay money. For these reasons, I think there was no contract, express or implied, on the part of the defendant for the direct payment of money, within the meaning of the attachment law, and that an attachment is unauthorized."

This reasoning is clear and convincing, and clearly applicable to the case at bar. The order of the court dissolving the attachment was correct. The order is affirmed.

REED and RICHMOND, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

Affirmed.

MR. JUSTICE ELLIOTT, having presided at the trial in the court below, did not participate in this decision.

ATCHISON V. GRAHAM.

1. CHATTEL MORTGAGE—CONSEQUENCES OF FAILURE OF THE MORTGAGEE TO TAKE POSSESSION ON DEFAULT OF PAYMENT.—After default in payment of a debt secured by a chattel mortgage the relations of the mortgagee to the property and the rights of creditors and subsequent purchasers in good faith are to be defined and determined by the principles applicable to the relation between vendees and creditors upon a sale of personal property. The mortgagee must take actual possession of the mortgaged property, and the possession must be open, notorious and unequivocal, such as to apprise the community, or those who are accustomed to deal with the party, that the goods have changed hands, and that the title has passed out of the mortgagor. Otherwise the property will be subject to levy and sale for the debts of the mortgagor, and to the rights of subsequent purchasers in good faith.
2. SAME—THE STATUTE DOES NOT AUTHORIZE THE MORTGAGOR TO RETAIN POSSESSION FOR TWO YEARS UNLESS SO SPECIFIED IN THE MORTGAGE.—The statutory provision that the mortgage shall be "good and valid from the time it is so recorded, for a space of time not exceeding two years, notwithstanding the property mortgaged * * * may be left in the possession of the mortgagor," does not authorize it to be retained by the mortgagor for that period of time unless it be so stipulated in the mortgage. Suffering mortgaged property to remain in possession of the mortgagor after default in payment is a fraud *per se*, and renders the mortgage void as to creditors both under the chattel-mortgage act and the statute of frauds.

Appeal from Superior Court of Denver.

Mr. A. B. MCKINLEY, for appellant.

Messrs. STEELE & MALONE, for appellee.

PATTISON, C. This is an action of replevin, brought by appellant to recover certain personal property of which she claimed ownership and right of possession. The facts out of which the litigation arose, briefly stated, are as follows:

September 6, 1884, appellant, through the agency of one E. J. Adams, loaned H. E. Kinney and George V. Horne, who were then doing business as copartners, the

14	217
16	321
14	217
17	567
14	217
1a	463
2a	168
14	217
3a	154
3a	491
14	217
4a	8
4a	183
14	217
7a	411
14	217
8a	24
8a	129
14	217
24	106
14	217
16a	452
16a	484
14	217
17a	210
14	217
19a	333
14	217
38	412

sum of \$840. On that day they gave their promissory note for that sum, payable three months after date, at the rate of three and one-half per cent. per month from date until paid. To secure the payment of the note they made, executed and delivered to Adams a chattel mortgage upon certain personal property, consisting of horses, harness, carriages, etc., then in their possession at the Kentucky Livery Stables in this city.

The chattel mortgage contained the usual covenants, among which was the following: "We will well and truly pay, or cause to be paid, the said promissory note * * * when the same shall become due and payable, without days of grace. * * *" It was also provided that, until default "in the keeping or performance of some one or more of the conditions, covenants or agreements above, herein or hereinafter mentioned, the said parties of the first part may keep, retain and use the said property, goods and chattels." Upon default the mortgagee was authorized to take immediate and full possession of the property.

Immediately after the note and mortgage were made they were transferred by Adams to appellant. The property remained in the possession of the mortgagors, and was used by them in their business, until December 6, 1884. In the evening of that day, Thomas Atchison, the husband of appellant, accompanied by Adams and one Brandt, went to the livery-stables of the mortgagors and demanded payment of the note. The note not being paid, Atchison, as agent of appellant, undertook to take possession of the property under the mortgage. No objection was made to the proceeding by the mortgagors. Accompanied by them, Atchison and Adams went through the stables, identifying the property described in the mortgage, and placing the same in charge of Brandt as custodian, with instructions that he should not permit the property to be taken from the stables. The property was not separated from other property belonging to the

mortgagors, nor was its position changed in any respect. Atchison and Adams then left the stables, and Brandt remained as the representative of appellant.

On Monday, December 8th, the mortgagors confessed a judgment in favor of one Suydam for the sum of \$1,474. The same day an execution upon the judgment confessed was issued and delivered to appellee or his deputy, A. H. Weber. Weber, upon the receipt of the execution, and at about 5 o'clock in the afternoon, went to the stables of the judgment debtor for the purpose of levying the execution. When he reached the stables he began to execute the process by making a list and inventory of the property in the usual form. While he was engaged in making the levy, he was informed by Brandt that the property was in his possession as agent of the mortgagee, and the mortgage itself was then and there exhibited to him. He thereupon proceeded no further with the execution of the process. Subsequently, having secured indemnity, he returned, and levied the execution upon the mortgaged property in the usual way. After the levy had been perfected, appellant caused demand to be made for the delivery of the property, and upon refusal brought this action.

The complaint is in the usual form. The answer put in issue the allegations of the complaint, and, for a second defense, justified the taking under the execution issued upon the judgment as above stated. A replication was filed, and upon these issues the cause was tried to the court, and judgment rendered for defendant. Motion for a new trial was made and granted. Before the trial an amended answer was filed by defendants, setting up as a further defense to the action that the mortgage was invalid, because, at the time it was made, a contract was entered into between the mortgagors and the mortgagee, by the terms of which the mortgagors were authorized, in effect, to sell the property mortgaged, and apply the whole or some part of the proceeds

to their own use. The allegations of the amended answer were put in issue by further replication by appellant.

In November, 1885, a second trial was had before the court without a jury, which trial resulted in a second judgment against appellant, from which this appeal was taken.

The sole question presented to this court is whether the judgment of the court below is sustained by the evidence. In considering this question, the defense interposed by the amended answer will be ignored, for the reason that there is no evidence which shows, or tends to show, that the mortgagors were to sell the mortgaged property. The discussion will be confined to the simple question whether, after default in the payment of the note, there was an actual delivery and change of possession of the property, within the meaning of the law, as settled by this court.

That the note given by the mortgagors matured December 6th, there can be no question. Days of grace were expressly waived by the provisions of the mortgage itself. That days of grace may be waived is elementary. 3 Rand. Com. Paper, § 1057. Failure to pay the note, therefore, upon that day, was a breach of the condition of the mortgage, which entitled the mortgagee to take immediate possession of the mortgaged property.

The question presented is whether the appellant actually took possession of the property, within the meaning of the chattel-mortgage act and the statute of frauds of this state, as interpreted and construed by this court. The rights and duties of mortgagees under the chattel-mortgage act of this state have never been fully defined by this court. It is an elementary principle that "a chattel mortgage at common law is void against creditors, unless accompanied by an actual delivery of the property to the mortgagee." Jones, Chat. Mortg. § 176. This principle of the common law has been adopted as a part of the statute law in this state. Section 163 of the

General Statutes provides that "no mortgage on personal property shall be valid as against the rights and interest of any third person or persons unless possession of such personal property shall be delivered to and remain with the mortgagee, or the said mortgage be acknowledged and recorded as hereinafter directed." Registry of the mortgage is, by this section, made a substitute for the delivery and change of possession of the property. Under this provision, personal property mortgaged may remain in the possession of the mortgagor, if the mortgage so provides, and it is acknowledged and recorded in accordance with the statute.

It is claimed by appellant that, under section 165, the mortgagor may retain possession of the property for the full period of two years, because that section declares that such a mortgage shall be "good and valid from the time it is so recorded, for a space of time not exceeding two years, notwithstanding the property mortgaged or conveyed by deed of trust may be left in the possession of the mortgagor." This construction of the language quoted cannot prevail. The time during which the property was to remain in the custody and possession of the mortgagor is in this case fixed and determined by the mortgage itself, and the rights of the parties, in this respect, are defined by the mortgage and not by the statute. The mortgage provides that the property shall remain in the possession of the mortgagors until default in payment or the maturity of the debt. Under the chattel-mortgage act, the property may remain with the mortgagor for the period "that such conveyance shall provide for the property so to remain," but in no event can the mortgagor retain possession of the property more than two years.

The statute now under discussion is that which was in force at the time the mortgage in question was made. By the amendment of 1887 it is provided that such mortgage shall "be good and valid from the time it is so re-

corded until the maturity of the last instalment of the mortgage indebtedness, but not exceeding two years, if the principal of said mortgage indebtedness be not exceeding \$2,500," etc. Laws 1887, p. 75.

The section of the chattel-mortgage act in force when the mortgage in question was made is a literal transcript of section 3 of the Revised Statutes of Illinois of 1845, chapter 20. This section has been construed again and again by the supreme court of that state. In *Reed v. Eames*, 19 Ill. 594, it is held that "under a chattel mortgage the mortgagee must take possession of the property upon the default of payment of the debt. Suffering property to remain with a mortgagor after a default in payment of a fraud *per se*, not subject to explanation. * * * The word 'so' in the proviso to the act respecting chattel mortgages has reference to the two years of time; meaning that, if the conveyance so expresses it, the property may remain with the mortgagor two years." *Thompson v. Yeck*, 21 Ill. 73; *Funk v. Staats*, 24 Ill. 632; *Reese v. Mitchell*, 41 Ill. 365; *Lemen v. Robinson*, 59 Ill. 115; *Dunlap v. Epler*, 88 Ill. 82.

In 1874 the chattel-mortgage statute of Illinois was revised, and such mortgages were declared to be valid, "from the time it is filed for record until maturity of the entire debt or obligation." R. S. Ill. 1874, § 4, ch. 95.

Under the statute and the authorities cited, it is clear that upon default it became the duty of Kinney & Horne to deliver the property to appellant, and that it became her duty to take actual and exclusive possession, and to assume absolute dominion and control over it. A chattel mortgage is in law a conditional sale of chattels, and operates to transfer the legal title to the mortgagee. Upon breach of the condition the title becomes absolute, and the mortgagee may then treat the mortgaged property as his own. After default, therefore, in the payment of the debt secured, the relations of the mortgagee

to the property, the rights of the creditors and subsequent purchasers in good faith, are to be defined and determined by the principles which are applicable to the relation between vendees and creditors upon a sale of personal property. Jones, Chat. Mortg. § 375; *Frank v. Staats*, *supra*.

The sufficiency of the delivery and change of possession, therefore, in this case, is to be determined by section 1523 of the General Statutes of this state, which declares that "every sale made by a vendor of goods and chattels in his possession, or under his control, * * * unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold or assigned, shall be presumed to be fraudulent and void as against creditors of the vendor, * * * and this presumption shall be conclusive."

This section has been repeatedly construed by this court. In *Cook v. Mann*, 6 Colo. 21, the rule is stated in the following language: "The vendee must take the actual possession, and the possession must be open, notorious and unequivocal, such as to apprise the community, or those who are accustomed to deal with the party, that the goods have changed hands, and that the title has passed out of the seller and into the purchaser. This must be determined by the vendee using the usual marks or *indicia* of ownership, and occupying that relation to the thing sold which owners of property generally sustain to their own property. The possession must be exclusive of the vendor. A concurrent or joint possession is not admissible." The same rule is announced in *Wilcox v. Jackson*, 7 Colo. 521.

In *Bassinger v. Spangler*, 9 Colo. 175, it was held: "It [the statute] admits of no excuse for leaving personal chattels, capable of manual delivery and removal, in the apparent possession of the vendor; nor does it admit of a construction whereby there may be a joint or concurrent possession in both vendor and vendee. Nor can a case

be taken out of the statute, nor can the statute be satisfied, by proving that the sale was *bona fide*."

The same doctrine was announced in April last in *Sweeney v. Coe*, 12 Colo. 485.

The rule is an arbitrary one. The reason of the rule has nothing whatever to do with its application, nor is it affected by the honesty or the good faith of the parties. Whenever personal property capable of manual delivery is left in the possession of the vendee, such possession cannot be explained, and constitutes a fraud in law. That there was no delivery of the property in controversy—no actual and continued change of possession within the meaning of the statute—will be apparent upon an examination of the evidence.

Adams, the first witness sworn in behalf of plaintiff, said: "When we went there on December 6th, we told them we would have to make the foreclosure. Horne made no serious objection to our foreclosing the mortgage. He said there were three days' grace, and I told him there was not. We checked off the stock, and I told Mr. Brandt to take charge of it. We didn't change the position of the stock nor the harness, nor separate it from the other property in the stables. We left it just as we found it. We did not put any notice or sign on the stable on December 6th."

Brandt, the custodian of the property, states: "We went to 549 Holladay street,—Kinney & Horne's stables. We went in the office, and stayed there about an hour, until Horne came, and then we went to work checking off the goods mentioned by me, and I was put in charge. I held the light while they were checking off. I stayed there all night. I did not go away. I had my breakfast, dinner and supper brought to me during the three days. I went out on the sidewalk, through the barn, and went across the street. I did not drive the horses under my charge. While I was there Hess, the hostler, fed the horses and took care of them. I do not know whether

he had any pay. I suppose he was working for Kinney & Horne. I did not move the horses out of the stable. I left all the property there. There was other property in the stable. The property put in my custody was not moved. It was watered and taken care of, and left right in the barn in the same place."

Atchison testified: "We did not separate the property in the chattel mortgage from the property that was not in the chattel mortgage. We did not put a sign over the door. I do not know as I noticed any sign there. I do not know who fed the horses in the barn. All the horses in the mortgage were not on the one side of the stable, I think. I think they were on both sides."

Horne, one of the mortgagors, called as a witness for defendant, testified: "Atchison said let the goods remain there for a few days. He said he would not move the goods. He would give us a few days to try and fix it up. We rented the barn. We paid the rent on it from the 6th to the 10th of December. Brandt sat in the office. He did not attend to the horses. I never saw him attend to hitching them up, or feed them, or curry them, even. He took no part whatever in anything pertaining to the horses or buggies. When I was there I attended to business the same as usual. Hess took charge of the horses. He was in our employ. We paid him, and paid him while Brandt was there, up to the time the sheriff came. We paid for the feed of the horses. They did not disturb any of the property,—they left them just as they found them. They did not take down the sign nor put up any sign. We offered horses for sale during this time. We used two of the horses in the package delivery, which were mentioned in the mortgage. 'George H.' was one of them. He worked all the while until the sheriff took possession. I drove the horses while Brandt was there."

Hess testified: "I was there when Atchison and Brandt came there on the evening of the 6th. They came there

in the afternoon, and stayed around the office. I had charge of the horses there,—attended to feeding and currying them. Brandt once in a while came back to the stable,—very seldom. I hitched up the horses every day. Brandt drove home to his meals mostly every day. I was under the direction of Kinney & Horne. Brandt never employed me. He did not say anything to me about feeding or currying them. I did not notice any change in the sign over the stable. No notice was put up. There was no change in the position of the stock between the 6th and 10th of December. Kinney & Horne used part of the stock most every day.”

If, upon this evidence, the court below had found that there was a delivery and change of possession of the property, such a finding could not have been sustained. To satisfy the statute, the possession of the vendee or mortgagee after default must be exclusive. He must exercise exclusive dominion and control over the property. Such dominion cannot be shared with the vendor or mortgagor. If the property is capable of manual delivery, it must be removed and taken from the possession of the vendor, or it must be so dealt with as to give notice to the community that there has been a change of ownership. If, to accomplish this end and satisfy the statute, it is necessary to remove the property from the place where it has been kept, such removal must be made, however great the expense or hardship may be. The change of possession must not only be actual, as between the parties, but apparent to the community.

In this case Kinney & Horne, the mortgagors, were the proprietors of the stable where the property was allowed to remain. No steps whatever were taken which would constitute notice to persons accustomed to deal with them that they were not still the owners of the property, or that their relation to the property was in any wise changed. Within the meaning of the statute, therefore, there was no change of possession, and for

that reason, default having been made in payment, the mortgage was void as to creditors, both under the first section of the chattel-mortgage act and the section of the statute of frauds which has been cited, and the plaintiff was therefore not entitled to recover.

The judgment should be affirmed.

RICHMOND, C., concurs. REED, C., dissents.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

Affirmed.

JOHNSON V. MITCHELL.

CONTRACTS — CONSIDERATION.— A promissory note was given by defendant solely as collateral security for a debt due plaintiff on account. Before the giving of the note this account, together with a trust-deed securing it, had been assigned to a third person. Defendant was ignorant of such assignment, and would not have executed the note had he known of it. After the assignment, and before the commencement of suit on the note, the assignee received payment in full of the account in question. The note had not been negotiated. *Held*, that plaintiff could not recover, there being no consideration for the note.

- *Error to Fremont County Court.*

Mr. A. MACON, for plaintiff in error.

CHIEF JUSTICE HELM delivered the opinion of the court.

There is no appearance in this court by defendant in error, and we are at a loss to know upon what ground the court below rendered the judgment challenged by the present proceeding.

The evidence before us, which was properly admitted under the pleadings, shows without serious conflict that the promissory note sued on was given by Johnson solely as collateral security for a debt to Mitchell & Co. upon

account, owed by a certain mining company, of which Johnson was the general manager; that prior to the giving of the note this account, together with a trust-deed securing the same, had been assigned to a third party, and neither Mitchell, the payee of the note, nor Mitchell & Co. retained any interest whatever therein; that Johnson was ignorant of such assignment, and would not have executed the note had he possessed knowledge thereof; that subsequent to the assignment mentioned, and prior to the commencement of suit, the assignee received payment in full of the account in question.

The promissory note in suit was not negotiated, and the action is between the original parties thereto. From the foregoing evidence it appears that there was no consideration in law for the original making of the instrument; also that the consideration upon which the maker supposed he was giving the instrument had failed by payment of the account prior to suit. Clearly, upon the record *as now presented to this court*, plaintiff below was not entitled to recover. The judgment is accordingly reversed.

Reversed.

HEINSSSEN V. STATE.

1. CONSTRUCTION OF STATUTES — LEGISLATIVE INTENT INDICATED BY CHANGE OF LANGUAGE IN AMENDMENT.— Where the language of a statute is radically changed by a subsequent amendment, such change indicates a change of intent on the part of the legislature.
2. CONSTRUCTION OF AMBIGUOUS STATUTES — LEGISLATIVE INTENT TO PREVAIL.— Although the provisions of an amendment to a law are ambiguous, it is the duty of the courts to discover, if possible, the intention of the legislature in framing the same, and to give the amended act such construction as will best effectuate the change intended.
3. AUTHORITY OF CITY COUNCIL OF DENVER TO LICENSE TIPLING-HOUSES SUBJECT TO CONDITIONS.— The authority of the city council of the city of Denver to license, tax and regulate tipping-

14	228
17	361
14	228
1a	157
14	228
19	114
14	228
20	494
14	228
24	358

houses, dram-shops, etc., is subject to the following, among other, conditions: (1) That the license rate to be charged shall not be less than certain minimum fees specified by the statute; (2) that the power granted shall only be exercised subject to the general law of the state regulating the manner of conducting the business by the licensee.

4. **KEEPING OPEN TIPLING-HOUSE ON SUNDAY — STATUTE APPLICABLE TO CITY OF DENVER UNDER PRESENT CHARTER.**— By the general law of the state the keeping open of a tipling-house on the Sabbath day or night is made a criminal offense, punishable by fine or imprisonment; and the fact that such house is situate in the city of Denver will not avail as a defense under the present city charter.
5. **EFFECT OF THE REPEAL OF A REPEALING ACT.**— When any act or part of an act is repealed, it is not revived by a subsequent repeal of the repealing act.
6. **SUSPENSION OF A GENERAL LAW BY A CITY ORDINANCE — REPEAL OF THE ORDINANCE.**— When the suspension of a general law within a municipality results from a city ordinance passed in pursuance of a special charter, the repeal of the ordinance will leave the general law in force within the city.

Error to District Court of Arapahoe County.

Messrs. EDGAR CAYPLESS and W. B. FELKER, for plaintiff in error.

S. W. JONES, Attorney-General, and Messrs. H. RIDDELL, I. N. STEVENS and L. C. ROCKWELL, for the state.

MR. JUSTICE HAYT delivered the opinion of the court.

Plaintiff in error, defendant below, was convicted in the district court of Arapahoe county for keeping open a tipling-house on the Sabbath day, in violation of section 151 of the Criminal Code of this state.

The place at which the act is shown to have been committed is situate within the corporate limits of the city of Denver, and the only defense relied upon is that said city, under its special charter, is excepted from the operation of the statute. The court below being of the opinion that the state law was in force within said city, the defendant was sentenced accordingly. To review this judgment the case has been brought here upon error.

The nature of the defense will more fully appear from an examination of the following provisions of the various special charters of the city of Denver, which have been in force at different times from the year 1833 to the present:

Paragraph 15, section 17, article 11, of the charter of 1883, reads as follows: "*Fifteenth*. The city council shall have exclusive power within the city to license, tax, restrain, regulate, prohibit and suppress tippling-houses, dram-shops, and the selling or giving away of any intoxicating or malt liquors, by any person within the city, except by persons duly licensed."

This provision was re-enacted without material change in 1885. See Sess. Laws 1885, p. 82. In the Revision of 1887 the same provision was retained, with the following proviso added: "Provided, that no license shall be issued to keep any liquor saloon or dram-shop, except on petition of the owners of a majority of the real estate within the frontage of the block in which said business is to be carried on, or upon the opposite frontage. When the person applying for such license has fully complied with the laws and ordinances applying thereto, the city council shall order such license issued. No license shall be granted for a saloon or dram-shop located within one block of any church or school building." Sess. Laws 1887, p. 84.

At the next session of the legislature (1889) the section was materially amended. In this case our attention will be directed more particularly to the section as amended. It reads as follows:

"*Twelfth*. (Exclusively subject to the general law of the state, but not at a lower price than \$600 to keep open until 12 o'clock, nor lower than \$800 to keep open until 2 o'clock, nor lower than \$1,000 to keep open all night.) To license and tax tippling-houses, dram-shops, billiard tables and bowling-alleys, and selling or giving away of any intoxicating or malt liquors by any person within the

city, and to regulate the same: *provided*, that no license shall be issued to keep any liquor saloon or dram-shop except on petition of the owners of a majority of the real estate within the frontage of the block in which said business is to be carried on. When the person applying for such license has fully complied with the laws and ordinances applying thereto, the city council may order such license issued: *provided*, however, that such license may be renewed from time to time, at the discretion of the city council, for a period not exceeding three years, without further petition. No license shall be issued for a saloon or dram-shop located within five hundred feet of any church or school building; the measurement to be along the same street on which the church or school building fronts, and along the adjoining side streets in the case the license is sought for a dram-shop or liquor saloon on such side street." See Sess. Laws 1889, p. 126.

During all the times hereinbefore mentioned the section of the Criminal Code under which this indictment was framed has been upon our statute books. The section reads as follows:

"Sec. 151. If any person shall be guilty of open lewdness, or other notorious act of public indecency, tending to debauch the public morals, or shall keep open any tippling or gaming-house on the Sabbath day or night, or shall maintain or keep a lewd house or place for the practice of fornication, or shall keep a common, ill-governed and disorderly house to the encouragement of idleness, gaming, drinking, fornication, or other misbehavior, every such person shall, on conviction, be fined not exceeding \$100, or imprisoned in the county jail not exceeding six months." See Gen. St. p. 331.

The only question presented for our determination upon this writ of error is, has the provision of section 151 of the Criminal Code, relating to tippling-houses, been in force within the territorial limits of the city of Denver

since the charter as amended in 1889 went into effect? It is settled by repeated adjudications of this court that, under the charter provision as it was framed prior to the adoption of the amendment of 1889, the state was divested of its control over tippling-houses within the territorial limits of the city of Denver, the city having accepted and exercised the exclusive powers conferred by its special charter. The correctness of those decisions has been vigorously assailed in argument and as strongly supported. In view of the conclusions reached upon another branch of this case, it is unnecessary for us to follow counsel in this discussion, as the result in this case would not be affected by any conclusion reached thereon. Therefore, without questioning the result announced in those cases, we shall consider the effect of the amendment made at the last (1889) session of the legislature. That the phraseology of the provision has been radically changed is conceded. The effect of such change is in dispute.

As a preliminary observation, attention is called to the fact that the authority of the legislative department of the state government over the subject-matter of the provision must be conceded within constitutional limitations. Arguments in reference to the policy and wisdom of particular laws are properly made to that department, and not to the judicial. As before announced by this court, it is for the courts to declare what the law is, and not what it ought to be.

It must be admitted in the outset that the provision of the charter under consideration is not free from ambiguity. But, while the uncertainty of the language to convey the intention of the legislature is to be regretted, it is nevertheless the duty of the judicial department to discover the intention of the law-making power in making the changes, so far as such intention may be disclosed by the application to the provision of well-settled rules of statutory construction, and, when discovered, to so

construe the act as to effectuate the purpose of the framers thereof. In obedience to one such rule of construction, we are required to presume that the change of language made by the amendment indicates a change of intent on the part of the legislature, and consequently calls for a change of construction; and, in deference to another rule of construction, some meaning must, if possible, be given to every part of the act.

We shall not attempt to give a critical grammatical analysis of the provision, nor shall we enter into a discussion as to the arrangement and specific definitions of the words employed, which produce the obscurity and ambiguity complained of. It might be difficult to discover an excuse for the use of language in the careless and ambiguous manner in which it is employed in the section under consideration. It is sufficient to say that any attempt to transpose the words, change the punctuation, strike out or transpose the parenthetical marks, in the manner advocated by counsel, would be open to serious criticism; and we conceive that such a process would be more apt to lead us to erroneous results as to the legislative intent than the course we shall pursue. Therefore, without indulging in specific speculations, we shall undertake to derive a conclusion from the entire context of the section, in the light of the two other rules of construction above mentioned. Doing this, our conclusion is that the legislature intended to confer upon the city council of Denver the authority to license, tax and regulate tippling-houses, dram-shops, etc., and that such authority was intended to be subject to the following, among other, conditions: (1) That the license rate charged by the city council for the privilege of keeping a tippling-house should not be less than certain minimum fees specified by the statute, varying according to the time of night when the same should be required to close; and (2) that the power thus granted be exercised subject to any general law of the state regulating the manner of

conducting the business,—that is to say, there being provisions in the general law requiring tippling-houses to be closed on the Sabbath day and also on election days, while the city council may regulate the carrying on of the business in other particulars, it can take no action that shall either prevent prosecutions under such provisions or confer rights in conflict therewith.

By this construction we give some meaning to every part of the act, and we have assumed, as we may properly do, that the legislature, in making the amendment, had in view the effect given to the word “exclusive” by the prior decisions of this court.

It is urged that this court in the case of *Huffsmith v. People*, 8 Colo. 175, and also in *Rogers v. People*, 9 Colo. 450, declared that the part of the Criminal Code upon which this prosecution is based was repealed within the corporate limits of the city of Denver the moment the exclusive power given the city to regulate tippling-houses was accepted and exercised by the corporate authorities; and, consequently, that the amendment of 1889, requiring the city to exercise its power subject to the general laws of the state, does not revive the section, in view of the inhibition of section 3142, General Statutes, viz.: “No act or part of an act, repealed by another act, shall be deemed to be revived by the repeal of the repealing act.” The argument derives its force entirely from the use of the word “repealed” in said opinions. If, therefore, it appears that this word, while sufficiently accurate, in view of the questions presented, was, strictly speaking, improperly used, and that when the city passed the ordinance the general law was not thereby repealed, but was, at most, suspended for the time being within the corporate limits of the city, and that the suspended statute was revived upon the repeal of the suspending act, the argument must fall.

The difference between a repealed and a suspended law is this: A repeal puts an end to the law; a suspension

holds it in abeyance. *Brown v. Barry*, 3 Dall. 365. That this distinction was in the mind of the judge who wrote the opinion in *Rogers v. People* is apparent from the fact that the word "suspend" appears several times in the opinion. The question before the court in that case is stated in this language: "Does the statute of 1885 * * * have the effect of suspending within the corporate limits of the city the operation *pro tanto* of section 839 of the General Statutes?" And the conclusion is stated in this manner: "(3) As we have already seen, the effect of this statute is simply to suspend within the corporate limits of Denver the operation of a part of said section 839."

The one instance in which the word "repeal" occurs in the opinion is in the midst of an argument, where the word "suspend" is used synonymously therewith; but care was taken to state the question presented, and the conclusion of the court thereon, with technical exactness. In reference to the use of the word "repeal" in the previous case of *Huffsmith v. People*, *supra*, the language of Paine, J., speaking for the court in *Smith v. Hoyt*, 14 Wis. 252, is precisely in point: "It is true we have an established rule, in the construction of statutes, that where an act or part of an act is repealed it shall not be deemed to be revived by the repeal of such repealing act. * * * It is true, also, that this court has, in speaking of the effect of the act of 1858 upon the previously existing provisions in regard to the time to answer, said that it repealed them so far as foreclosure actions were concerned. * * * That language was natural, in view of the questions presented in that case, and was sufficiently accurate for the purpose of disposing of them. But we are of the opinion that, strictly speaking, the general provision requiring defendants to answer within twenty days was not repealed by the act of 1858, nor by that of 1859, allowing ninety days to defendants in mortgage foreclosure cases, but that those acts

merely excepted this particular class of defendants from its operation. That being so, where the statute creating the exception is repealed, the general statute, which was in force all the time, would then be applicable to all cases according to its terms. And this would be no violation of the rule of construction, before referred to, that the repeal of a repealing act should not revive the act repealed. * * * If a proviso creating an exception to the general terms of a statute should be repealed, courts would be afterwards bound to give effect to it according to those general terms, as though the proviso had never existed; and this could not be said to revive a repealed statute. The rule against this relates to cases of absolute repeal, and not to cases where a statute is left in force, and all that is done in the way of repeal is to except certain cases from its operation. In such cases the statute does not need to be revived, for it remains in force, and, the exception being taken away, the statute is afterwards to be applied without the exception."

Our attention is called to the case of *State v. De Bar*, 58 Mo. 395. The facts in that case were very similar to those presented here. In the previous case of *State v. Clarke*, 54 Mo. 17, the court had held that a charter granting exclusive authority to the city of St. Louis repealed, by implication, the general statute of the state, etc., within the territorial limits of said city. Afterwards, upon repeal of this provision of such charter, the question arose as to whether the general law was revived within the city by such repeal, and the court, by a bare majority, held that it was not. In reference to this conclusion, Judge Dillon, who is perhaps the best living authority upon the law governing municipal corporations under our system of government, expresses his disapproval in this emphatic language: "This last decision seems to the author to be erroneous, on the ground that the act of 1870 did not *ipso facto* repeal the general law in the city, but such repeal, or suspension, rather, was

only effected when the city passed the ordinance. If so, a repeal of the ordinance by the council, without the act of 1874, would have left the general law of the state in force within the city, and its repeal by the act of 1874 would have precisely the same effect." 1 Dill. Mun. Corp. 115.

As the argument advanced in the opinion of the majority of the court in *State v. De Bar* does not commend itself to our judgment, we shall decline to follow the conclusion reached. In our opinion, that portion of section 151 of the Criminal Code relating to tippling-houses has never been repealed. At most, the city of Denver for a time was excepted from its operation, or it may be said this provision was suspended for a time within the territorial limits of said city. Upon the taking effect of the amendments of 1889 the suspension ceased, and the operation of the general law was restored. The judgment must therefore be affirmed.

Affirmed.

MR. JUSTICE ELLIOTT. In my judgment, the decision of this case should be placed upon broader and more substantial ground than is taken in the foregoing opinion. The general assembly may, undoubtedly, by special charter, confer upon the city council of Denver power by ordinance to license and regulate tippling-houses, as well as to suppress and prohibit all disorderly houses within the limits of the city. But the vital question for our determination is, May such power be made exclusive? In popular parlance, may the city council be invested with power to declare by ordinance that people may commit certain offenses with comparative impunity within the limits of the city of Denver, which, if committed outside of such limits, would subject them to indictment and punishment by heavy fines or imprisonment? In more legal phrase, may such power be so vested in the city council of Denver as to take away the power and juris-

diction of the district court to enforce the general public law of the state within the limits of the city in relation to certain crimes or misdemeanors, as provided by the Criminal Code?

Important as these questions may be, when considered in relation to the public morals and the general welfare of the state, I shall consider them only from a legal and constitutional stand-point, bearing in mind that my official duties are judicial, not legislative.

The district courts of this state are invested by the constitution with "original jurisdiction of all causes, both at law and in equity." Art. 6, § 11. By section 28 of the same article it is provided that "all laws relating to courts shall be general and of uniform operation throughout the state; and the organization, jurisdiction, powers, proceedings and practice of all the courts of the same class or grade, so far as regulated by law, and the force and effect of the proceedings, judgments and decrees of such courts severally, shall be uniform." Section 1 of the Criminal Code (ch. 25, Gen. St.) reads as follows: "A crime or misdemeanor consists in a violation of a public law in the commission of which there shall be an union or joint operation of act and intention, or criminal negligence." From these constitutional and legislative enactments it follows that, so long as section 151 of the Criminal Code remains upon our statute books as a public law of the state, any intentional violation of its provisions is a crime or misdemeanor, and, as such, is within the constitutional jurisdiction of the district court of the county where the offense is committed, and that it is beyond the power of the general assembly to divest the district court of such constitutional jurisdiction.

It cannot be denied that the general assembly may confer upon the municipal authorities jurisdiction concurrent with that of the state courts over certain offenses; but any legislative enactment which purports to make such jurisdiction exclusive over an offense declared to be

a crime or misdemeanor by the public law of the state is repugnant to the constitution, and conveys nothing more than concurrent jurisdiction over such offense. The constitutional jurisdiction of the district courts, being general, unlimited, and uniform throughout the state, cannot be impaired by such legislation. The general assembly may repeal section 151 of the Criminal Code altogether. Thus the same would cease to be a public law of the state, and thus the power and jurisdiction of the district courts throughout the state, in relation to keeping tippling-houses open on Sunday, would cease. This, however, would be no infringement upon the uniform jurisdiction of such courts.

But it is contended that the provision of the city charter purporting to give exclusive power over tippling-houses and other kindred matters does not interfere with the uniform jurisdiction of the district courts; that it is not a law relating to such matters, nor designed to regulate their jurisdiction; that the effect of the charter provision is to suspend the operation of a certain portion of the criminal law within the city limits whenever the city council by ordinance accepts and assumes jurisdiction of the matters thus confided to its special care. This argument is ingenious, but, in view of the position taken by the party advancing it in this litigation, it cannot be accepted as ingenuous. If the provision in the charter purporting to give exclusive power to the city council in relation to tippling-houses is not designed to regulate or interfere with the jurisdiction which the district court of Arapahoe county exercises in common with that of other district courts in the state in cases of this kind, how does it happen that, in this and other cases arising under section 151 of the Criminal Code, we find the accused pleading such charter provision, and the ordinances enacted in pursuance thereof, against the jurisdiction of the Arapahoe county district court? It is not pretended that an indictment for such an offense could be quashed by such a plea in the district court of any other county.

Impressed with the importance of upholding judicial decisions as a means of giving stability to the law and security to public and private rights, I have hesitated to take the responsibility of expressing views in conflict with some of the previous decisions of this court; but the strongest necessity seems to demand such a course before we drift too far from fundamental principles. The views here expressed are not intended as a revolt against *stare decisis*, but rather as a restoration of that rule; for, while they are opposed to the doctrine announced in *Huffsmith v. People*, 8 Colo. 175, and *Rogers v. People*, 9 Colo. 450, they are nevertheless in harmony with the earlier decisions of this court, as well as the current of decisions of other appellate courts upon similar questions. An examination of the authorities will abundantly confirm this statement.

Section 12, article 6, of the constitution of Illinois, adopted in 1870, confers upon the circuit courts of that state "original jurisdiction of all causes in law and equity." Section 29 of the same article reads as follows: "All laws relating to courts shall be general, and of uniform operation; and the organization, jurisdiction, powers, proceedings and practice of all courts, of the same class or grade, so far as regulated by law, and the force and effect of the process, judgments and decrees of such courts, severally, shall be uniform."

It will be observed that sections 11 and 28 of article 6 of our constitution, adopted six years later, are in legal effect complete duplicates of the Illinois constitution, with the addition of the three words "throughout the state," which additional words only serve to emphasize the uniform construction which this provision has received from the supreme court of Illinois. No one can doubt that these provisions of the Colorado constitution were borrowed from Illinois. Hence, so far as such provisions had received a definite construction by the supreme court of Illinois prior to their adoption by this

state, it is, by a familiar rule, to be presumed that we adopted such construction with the provisions. *Stebbins v. Anthony*, 5 Colo. 348.

In the case of *People v. Rumsey*, 64 Ill. 44, it was held that an act relating to the employment of stenographic reporters in the courts of Cook county was a local or special act, and obnoxious to the constitutional provision requiring uniformity in all laws relating to courts, and that "this provision of the constitution executed itself and operated *in præsentia*;" and so the local enactment was held to have been abrogated by the adoption of the constitution. This decision was rendered in 1872. Numerous decisions of a similar kind were rendered during the years 1871, 1872 and 1873 by the Illinois supreme court.

The case of *Myers v. People*, 67 Ill. 503, was decided in 1873. It was a prosecution for the illegal selling of liquor. One of the questions considered and passed upon was whether an act purporting to invest the county courts in certain counties with exclusive jurisdiction in certain criminal cases was in conflict with section 29, article 6, of the Illinois constitution. The court held that the act "must be construed as conferring only concurrent jurisdiction;" the legislature having "no power to abridge the original jurisdiction of the circuit courts;" and also that so much of the act as attempted to restrict its application to the courts of certain counties was unconstitutional,—thus carefully preserving the jurisdiction of all the circuit courts intact and unimpaired, and also making the law uniform throughout the state. Here was a definite and clear construction of both constitutional provisions under consideration. This decision was announced three years before we borrowed the constitutional provisions from Illinois, and made them a part of our fundamental law. Certainly it cannot be maintained that the general assembly may, in a matter pertaining to the administration of a public law, such as the Crimi-

nal Code, confer exclusive power upon the city council to accomplish by mere ordinance what it cannot confer directly upon constitutional tribunals, such as county courts established throughout the state.

The case of *Siebold v. People*, 86 Ill. 33, decided in 1877, was a prosecution by indictment in the circuit court for keeping a tippling-house open on Sunday in the city of Peoria, Ill. The conviction was sustained, though the decision has no direct bearing upon the question under consideration, inasmuch as the charter of Peoria did not profess to confer upon the city authorities exclusive jurisdiction in such matters.

The case of *Hart v. People*, 89 Ill. 407, decided in 1878, is directly in point. The opinion in that case was on an appeal from a conviction in the circuit court of Jo Daviess county for keeping open a tippling-house on Sunday within the limits of the city of Galena. An effort was made to reverse the judgment on the ground that the charter of the city provided that the city council should have full and exclusive power and authority to tax, license, regulate, restrain and prohibit tippling-houses, etc., within the limits of the city. In that case, as in the one now under consideration, there was considerable controversy as to the proper construction and effect of the several charters of the city of Galena in connection with the criminal law of the state; but the court, without determining these questions, placed its decision squarely upon the ground that exclusive jurisdiction over the offense could not be conferred upon the city. The following extract from the opinion will show the views of the Illinois court:

"These are questions [referring to the construction and effect of the several charters] which we do not find it necessary to consider, as there is another ground upon which we must hold there is no exclusive power and authority over the subject-matter of this offense in the city of Galena; and that is, the operation of the constitution

of 1870. By section 29, article 6, of that constitution, 'all laws relating to courts shall be general, and of uniform operation; and the organization, jurisdiction, powers, proceedings and practice of all courts of the same class or grade, so far as regulated by law, and the force and effect of the process, judgments and decrees of such courts, severally, shall be uniform.' It is inconsistent with this section of the constitution that, after the adoption thereof, exclusive jurisdiction over this offense should be in the city of Galena, and the circuit court of Jo Daviess county not have cognizance thereof. All other circuit courts of the state have jurisdiction of this offense, when committed in the respective counties of such courts, they having cognizance thereof by indictment in such courts; and if the circuit court of Jo Daviess county be held an exception in this respect, and not to have cognizance of the offense, then its jurisdiction in this respect will be anomalous, and not uniform with that of the other circuit courts of the state. This would be inconsistent with the constitutional provision that the jurisdiction of all courts of the same class or grade shall be uniform. Any exclusive jurisdiction, then, which there may have been in the city of Galena in respect to the subject-matter of this offense, before the adoption of the present constitution, must be held as having been taken away and abrogated by the adoption of that constitution, as being inconsistent with the above-cited provision thereof."

The foregoing opinion, as well as all the Illinois decisions construing the new constitution upon this subject, appear to have been pronounced by the unanimous concurrence of the seven judges.

Before considering other authorities, let us see what the decisions of the supreme court of Colorado have been upon the subject of local and special legislation, as affecting the jurisdiction of the courts and the rights and privileges of the people. In *Paton v. People*, 1 Colo. 77, it

was held that a party might be convicted under the general law of the territory for selling liquor in quantities less than one quart, notwithstanding he had a license from an incorporated city where the offense was committed; but in that case the city was not given exclusive power over the subject.

In *Hetzer v. People*, 4 Colo. 45, a municipal license was held to be a complete protection from prosecution under the general law, the authority to license being vested exclusively in the corporate authorities; but the cause of action in the *Hetzer Case* arose, and final judgment was rendered in the district court, before the adoption of our constitution, though not reviewed in this court until afterwards.

In *Ex parte Stout*, 5 Colo. 509, decided in 1881, an act providing for a criminal court in Arapahoe county was held to be repugnant to section 28, article 6, of the constitution, and so was declared unconstitutional on the ground that it was "clearly a special or local act, applicable to the criminal court of Arapahoe county only, and wholly independent of the Lake county act in every respect." In that case, section 28, article 6, of our constitution, is spoken of as "borrowed from the constitution of 1870 of the state of Illinois;" and several Illinois decisions subsequent to 1870 are cited giving the construction to the provision as heretofore shown by this opinion. In the *Stout Case* the court also said:

"No discretion is invested in the legislature concerning the character of the law by which the organization, jurisdiction, powers, proceedings and practice of these courts shall be prescribed and regulated. The direction is peremptory that *it shall be a general law of uniform operation throughout the state.*"

In 1885 the *Lowrie Habeas Corpus Case*, 8 Colo. 499, came before this court. Lowrie had been convicted and sentenced to the penitentiary by the criminal court of Arapahoe county for the crime of grand larceny. In a

most elaborate opinion the court held the conviction void, on the ground that the prosecution was by information in the criminal court instead of indictment. Section 28, article 6, was discussed in the opinion, but the decision was based upon section 8 of the bill of rights, which provides, *inter alia*, "that, until otherwise provided by law, no person shall, for a felony, be proceeded against criminally, otherwise than by indictment;" and it was held that an act dispensing with an indictment by a grand jury in felony cases, to be constitutional, must not only be "general and of uniform operation throughout the state," as applied to "courts of the same class or grade," but that it must also be applicable to all courts having jurisdiction of felony cases. The following significant and pertinent language was used in the opinion: "Clearly, if the object of the grand jury system is to guard certain fundamental rights of every citizen of the state, it follows, according to elementary principles of construction, that the change, regulation or abolition of the system must be so made as to equally affect the whole community in respect to the same rights and immunities, under the same or similar circumstances.

"It cannot reasonably be contended that such is the effect produced by the act of February 7, 1883. The effect of such legislation to the citizen is, if he be charged with the commission of a felony or infamous crime not capital, within the jurisdiction of a criminal court, an information may be filed against him therein, upon the oath of a single informer, and he may be put upon his trial therefor; whereas, if charged with the commission of the same offense outside of such jurisdiction, or if proceedings be instituted against him within such jurisdiction, but in a district court instead of a criminal court, he would be accorded the right and privilege of having the truth of the charge investigated by a grand jury composed of his peers, before he could be put to the expense, inconvenience and disgrace of a public trial."

The foregoing quotations from the *Stout* and *Lowrie Cases* indicate how strictly the constitutional jurisdiction of the courts of this state has been protected from the encroachments of special and local legislation calculated to affect their uniformity; and also how jealously individual rights and privileges have been guarded by the enforcement of constitutional guaranties securing equal and impartial protection to the people of every community in respect to prosecutions for crime in every part of the state. These judicial utterances, based upon sound reason, and inspired by a conscientious regard for constitutional requirements, as well as individual rights and privileges, have an important bearing upon the cases next to be considered.

The case of *Huffsmith v. People*, 8 Colo. 175, was a conviction upon an indictment by the grand jury in the district court of Arapahoe county for the offense of keeping open a tippling-house on Sunday. Upon error in this court, it was decided that the accused was entitled to show that the house so kept was located within the corporate limits of the city of Denver; that the city had assumed jurisdiction over the entire subject pertaining to such houses, by the enactment of certain ordinances in pursuance of the charter giving the city council exclusive power within the city to license, tax, regulate, restrain, prohibit and suppress tippling-houses; and so it was held that "the amended charter of the city of Denver, and the ordinances passed thereunder, afford the defendant protection against this prosecution,"—the court declaring that the "jurisdiction of the city was exclusive as to the whole subject-matter of the offense," and also that it seemed "impossible that a concurrent jurisdiction to restrain tippling-houses can exist in the state and in the city as well. The same statute which confers upon the city exclusive control over such houses divests the state of its control over them," and also that to this extent the charter "repealed the general law by necessary implica-

tion." Evidently the idea that a portion of the Criminal Code was suspended — not repealed — by the exclusive clause in the charter, and that the same does not interfere in any manner with the jurisdiction of the courts, was not then entertained by this court.

The case of *Rogers v. People*, 9 Colo. 450, extends the doctrine of the *Huffsmith Case* to the keeping of lewd houses. The plaintiff in error, having been indicted for such offense in the district court of Arapahoe county, sought shelter under the provision of the Denver charter, and the ordinances enacted in pursuance thereof; and they were held available to protect the accused, and to defeat the prosecution, in the court of last resort.

The indictments in the *Huffsmith* and *Rogers Cases* were based upon the same statute, section 151 of the General Criminal Code of the state, which provides, in substance, that if any person shall be guilty of open lewdness, etc., or shall keep open any tippling or gaming house on the Sabbath day or night, or shall maintain or keep a lewd house, etc., or shall commit certain other offenses therein specified, such person shall, on conviction, be fined not exceeding \$100, or imprisoned in the county jail not exceeding six months. This statute was enacted prior to the adoption of the state constitution, was continued in force by that instrument, and has remained a part of the Criminal Code of Colorado ever since the revision of 1868. As the law has existed during all that time, punishment in case of a violation of this statute can only be inflicted upon conviction in a court of record upon an indictment by a grand jury of the proper county. It requires no argument to show that the Denver charter is construed by the decisions in the *Huffsmith* and *Rogers Cases* to be a law regulating and restricting the jurisdiction of the district court of Arapahoe county in tippling and lewd-house cases, while it does not in any manner affect the jurisdiction of the several district courts in such cases elsewhere in the state. Such con-

struction, therefore, must be erroneous, because it cannot be reconciled with section 28, article 6, of the constitution, which provides that the jurisdiction "of all the courts of the same class or grade, so far as regulated by law, * * * severally, shall be uniform."

Neither the *Myers Case*, in 67 Ill., nor the *Hart Case*, in 89 Ill., nor any of the numerous cases decided by the Illinois supreme court bearing upon our borrowed provisions of her new constitution, are noticed in the opinion delivered in the *Huffsmith Case*. As none of these cases appear in the brief of the attorney-general filed in that case, I am constrained to conclude that they were overlooked by the court, and yet such conclusion seems strange; for they had been decided and published years before—the *Hart Case* six years before the *Huffsmith* decision, and the *Myers Case* three years before the adoption of our constitution. Besides, they had been frequently cited and always followed in the *nisi prius* courts of Arapahoe county until the announcement of the *Huffsmith* decision rendered them unavailing. The *Siebold Case* was noticed in the *Huffsmith* opinion, but, as we have seen, it does not bear upon the question of uniform jurisdiction. The case of *Bennett v. People*, 30 Ill. 359, was also relied on, but the opinion was rendered therein long before the adoption of the new constitution, so it furnishes no better support than the *Hetzer Case* in Colorado. The only other authorities cited in the *Huffsmith* opinion are two cases from Missouri; but, as that state has no such constitutional provision as ours concerning the uniform jurisdiction of courts, her judicial decisions can have no weight as against the unbroken current of unanimous decisions by the supreme court of Illinois, based squarely upon the constitutional provisions in question.

Turning to the *Rogers Case*, decided two years after the *Huffsmith Case*, we find the same dearth of authority in respect to the question under consideration. Not

a single authority is noticed or cited in the opinion bearing upon the construction of section 28, article 6, of our constitution. An able effort, however, is made to combat the construction given by the Illinois courts to that constitutional provision. It is strongly urged by the able jurist delivering the opinion in the *Rogers Case*, that "the statute conferring upon the city council of Denver exclusive authority to prohibit and suppress the evil mentioned is sanctioned by the constitution itself;" and that the charter "does not deal, nor was it intended to deal, in any manner with courts or their jurisdiction." Notwithstanding all this, the accused having challenged the jurisdiction of the court by pleading the charter and ordinances of the city against the indictment, the opinion concludes with the statement that "the plea to the indictment was good." In other words, the argument is that the granting of exclusive power to the city is equivalent to taking away the jurisdiction of the court, and yet that the charter does not deal with courts nor affect their jurisdiction. I must confess myself incapable of comprehending this logic. It is true the charter does not purport to affect the jurisdiction of *courts in general*, but it is construed by the opinion to affect the jurisdiction of *one court in particular*, and therein lies the mischief.

Some reliance is placed upon the fact that the city of Denver has a special charter; and section 13, article 14, of the constitution, is referred to in the *Rogers Case* as authorizing the organization and classification of towns and cities, and the granting of different powers and restrictions to the different classes of municipal corporations. The learned justice claims that "there is clear constitutional authority for bestowing upon one class, within certain limits, exclusive legislative control over a given subject pertaining to local self-government, while another class is allowed only concurrent power in connection therewith." But we look in vain for any consti-

stitutional provision by which municipal corporations, whether organized under special charter or by general law, may be authorized to interfere with the uniform constitutional jurisdiction of the district courts in the enforcement of the general laws of the state, civil or criminal.

In the case of *Darrow v. People*, 8 Colo. 417, it was held that the charter provision providing that each board of the city council shall be the sole judge of the qualifications, election and returns of its own members, deprives the court of jurisdiction in determining such matters; but this was a special provision pertaining to the organization of the council itself, and, so far as the election and returns of its own members are concerned, exclusive authority might well be thus vested in pursuance of section 12, article 7, of the constitution, which authorizes the general assembly to provide for the trial of election contests in certain cases. This view was taken in the case of *People v. Londoner*, 13 Colo. 303, but in the *Darrow Case* it seems not to have been urged in behalf of the people that the charter provision making each board the sole judge, etc., might, in certain *quo warranto* proceedings, be in contravention of the constitutional requirement concerning the uniform jurisdiction of the courts; at least, that point is not discussed in the opinion.

I shall not extend this opinion to an examination of further authorities in detail. Judge Dillon, in his standard work on Municipal Corporations, speaking of by-laws or city ordinances, says they must be reasonable and lawful, impartial, fair and general; must not contravene common right; must be consistent with the public legislative policy; and subordinate to the general laws of the state. Mr. Justice Cooley, in his able treatise on Constitutional Limitations, speaking of the suspension of general laws, says: "The legislature may suspend the operation of the general laws of the state; but when it

does so the suspension must be general, and cannot be made for individual cases or for particular localities." Page 484.

So far as we have been advised, no state, other than Illinois, has a provision corresponding to our own requiring uniformity of jurisdiction for courts of the same class or grade. But authorities are not wanting to the effect that city governments, even under most liberal charters granted by states having no such constitutional restrictions, cannot nullify the general laws of the state by the enactment of mere municipal ordinances. Missouri and Texas, and perhaps other states, without constitutional safeguards to control their legislatures and protect the equal rights of all their citizens, may be fairly claimed to allow a discrimination between their cities and rural communities in respect to the observance of some of their general criminal laws. But Indiana, Michigan, West Virginia, Arkansas, New Jersey, Georgia and North Carolina, and perhaps other states, have recorded opinions of an opposite character and tendency. *Sloan v. State*, 8 Blackf. 361; *Slaughter v. People*, 2 Doug. (Mich.) 334; *Eckhart v. State*, 5 W. Va. 515; *Reich v. State*, 53 Ga. 73; *State v. Moss*, 2 Jones (N. C.), 66; *State v. Anderson*, 40 N. J. Law, 224; *Rector v. State*, 6 Ark. 187; *State v. Devers*, 34 Ark. 189.

It is not claimed that the rule is absolute that under no circumstances may we borrow a constitutional or statutory provision from another state, and then reject the construction which the courts of the former state have previously given it; but such departure should not be made without the strongest reasons therefor. In this instance we find the Illinois construction in harmony with our own earlier decisions upon analogous subjects. It was manifestly the intention of our people, in adopting our excellent constitution, containing so many provisions against local and special legislation, and so many in favor of uniformity, to secure equality and impartiality

in the administration of the law among all classes and communities throughout the state. The construction contended for in this opinion is one step, and a long one, in the right direction. It is unfortunate that it did not meet with the unanimous approval of this court when the occasion was first presented, as it did in the courts of Illinois. Our court started aright in the *Stout Case*, recognizing the fact that the provision of section 28 of our judiciary article was borrowed from the constitution of 1870 of the state of Illinois. The same rule was recognized and extended in the *Lowrie Case*, four years later. I am aware it may be said that the *Lowrie Case* was one of felony, and that the decision turns upon the fact that the word "felony" is used in section 8 of the bill of rights; but the language which we have quoted from that opinion is equally applicable to the case under consideration. A single illustration will suffice: A person charged with an offense under section 151 of the Criminal Code, in the city of Denver, might well claim that he should be "accorded the right and privilege of having the truth of the charge investigated by a grand jury composed of his peers before he could be put to the expense, inconvenience and disgrace of a public trial." So, too, stating the illustration conversely, a person charged with committing such an offense outside of the limits of the city might well claim that he should not be subject to indictment, conviction and imprisonment so long as his fellow-citizens might commit such offenses within the limits of the city without subjecting themselves to anything more than a paltry fine, under the city ordinances. Indeed, the offense specified in the indictment in this case cannot be committed at all within the city, under the ordinances as now framed, except between the hours of midnight Saturday night and 5 o'clock Sunday morning. But it is idle to pursue these illustrations. Common fairness, common justice and common sense revolt at such inequality and such unjust

discriminations between individuals and neighboring communities in the same state. If the people desire tippling-houses kept open every day and night in the week, election days as well as Sundays; if they desire to remove all restrictions against selling liquor to Indians, children and common drunkards, as well as other people,—let the law upon these subjects be repealed, and let these privileges be extended equally to all classes and communities of our people. I know of nothing in the constitution to forbid such a course. What I am insisting upon is that such laws as we have shall be enforced by the courts throughout the state according to the uniformity rule prescribed by the constitution.

Neither the constitution nor the laws of Colorado recognize any particular form of religious faith or practice. In fact, the constitution very properly forbids any such legislation. But the constitution does guaranty the free exercise and enjoyment of religious profession and worship without discrimination, and secures the liberty of conscience to every one so far as the same is consistent with good morals and the peace and welfare of society. Our laws do not recognize Sunday as having any particular sanctity or sacredness above other days; but the law does recognize *the fact* that large numbers of our people abstain from their usual employments on Sunday, and that many of them devote the day more or less to religious worship and works of charity, while others enjoy it as a day of rest, recreation or pleasure, according to their several inclinations. Hence the law provides that public offices shall not be kept open, that courts shall not sit, except in cases of necessity, and that commercial paper shall not mature on Sunday. Provision is also made to secure peace and quiet, and to prevent dissipation and disturbance, to the end that citizens of all classes may enjoy the privileges of the day as they severally please, in an orderly manner, without trespassing upon the privileges of others. These are proper subjects of legislation, of which no one can justly complain, so

long as they bear equally upon all classes. The observance of one day in seven as a day of rest is conducive to the sanitary, moral and physical well-being of the race, as the history of the world and experience of mankind abundantly attest. It is not contended that these considerations have a controlling effect upon the construction of the constitution and laws in question, but they are persuasive in favor of accepting the construction already given by the highest court of a sister state upon the subject. So I conclude that this court should feel itself bound by that construction and interpretation of the constitution which forbids that the city of Denver should be allowed by ordinance to nullify the general laws of the state. For these reasons I concur in the conclusion announced in the opinion of Mr. Justice HAYT, that the judgment of the district court must be affirmed.

Affirmed.

THOMAS V. PEOPLE.

CONTEMPT OF COURT—WHEN NECESSARY TO THE JURISDICTION THAT AN AFFIDAVIT BE PRESENTED.— When it is manifest from the course of the proceeding that the language of a petition for a change of venue on the ground of the alleged prejudice of the presiding judge is not a contempt *per se*, but only a constructive contempt, if any, the court is without jurisdiction to order a warrant of attachment to issue against the offender unless an affidavit be presented containing a statement of the facts constituting the contempt. The unsworn report of a committee appointed by the court to inquire into the matters alleged, itself unsworn, does not perform the office of an affidavit.

Error to District Court of Gunnison County.

MESSRS. THOMAS BROS. & WEGENER, F. C. GOUDY and LOUIS BOISOT, for plaintiff in error.

H. M. HOGG, District Attorney, for the People.

PATTISON, C. The judgment sought to be reviewed in this case was rendered in a proceeding instituted against

14	254
15	440
14	254
17	256
14	254
23	418
14	254
35	374
35	376
35	400
35	401
37	421

plaintiff in error and others for an alleged contempt of court.

It appears from the record that prior to July 12, 1886, there were pending in the court below certain actions at law, wherein one Carrie L. Davis was plaintiff, and John H. Bowman, then sheriff of that county, was defendant.

Plaintiff in error was one of the attorneys for the defendant in those actions. On the day named he caused a petition, which had theretofore been prepared by him, praying for a change of the place of trial of the actions mentioned, to be presented to the court. The petition was made under section 31 of the Code of Civil Procedure, then in force. This section provided for change of the place of trial, whenever a party "shall fear that he will not receive a fair trial in the court in which the action is pending, on account that the judge is interested or prejudiced," etc.

The petition alleged prejudice of the judge. In compliance with the requirements of the section, as construed by this court, the facts and circumstances upon which the allegation of prejudice were predicated were set forth in detail. *Christ v. People*, 3 Colo. 394; *Hughes v. People*, 5 Colo. 436. It is unnecessary to recite these facts and circumstances.

When the petition was presented to the court, it was not read by counsel, but was submitted to the judge for his consideration. Immediately after reading the petition, the judge, upon his own motion, caused an order to be entered, appointing a committee, consisting of three members of the bar, "to inquire into the matters alleged in said petition, with full authority to administer oaths, and send for persons and papers, and to take such action in the premises as they may deem proper." The committee was not required to take the oath of office.

Subsequently the committee presented a report, the concluding paragraph of which was as follows: "Your

committee would, therefore, conclude from the charges presented in said affidavit, as well as from the evidence adduced before us, that such charges are a serious reflection upon the honor, integrity and dignity of this court, and that the same were made recklessly, and without sufficient inquiry as to the truth of the allegations therein contained, so far as they affect the judge of this court, and that the party making, as well as the persons causing said affidavit and petition to be filed, are in contempt of this honorable court."

The report was not verified by the committee, or any one of them. Plaintiff in error was not permitted to participate in the proceedings had before the committee in any manner. When the report was submitted, the court caused the same to be spread upon the minutes of the court, directed the evidence taken to be filed with the clerk, and ordered the district attorney of the district to file an information "against all of the parties concerned in filing the said petition."

Pursuant to the order, the proceeding now sought to be reviewed was instituted. The information alleged that plaintiff in error and the other parties concerned in the suit in which the petition was filed, in making and presenting the petition, committed gross acts of contempt of the district court, in that they caused the petition to be filed, published, etc. A copy of the petition was set forth in the information. The information was not verified.

Upon the filing of the information the court ordered an attachment for contempt to issue against plaintiff in error and others, returnable forthwith. When the warrant of attachment was returned by the officer, motion to quash the information and warrant was filed, because — "*First*, the said information does not state facts sufficient to constitute a contempt of court; *second*, because the information filed herein is not verified." The motion was overruled.

Thereupon plaintiff in error filed his separate answer to the information, in which, among other things, he expressly avers that, by the language contained in the petition for change of venue, he intended no reflection upon the character or integrity of the court, nor the judge thereof, but he thought he was within the line of professional duty to his client, and at the time thought it necessary to make the allegations contained in the petition."

Upon the information and answer, plaintiff in error was adjudged to be guilty of contempt, and a fine of \$500 was imposed upon him.

It is only necessary for this court to determine whether the proceedings had prior to the issuance of the warrant of attachment conferred jurisdiction upon the court to issue the process. It is manifest, from the course of the proceedings, that the language of the petition for the change of venue was not deemed to be contempt *per se*; that the contempt, if any, was not regarded as direct, but constructive. The court was correct in its assumption. *Ex parte Curtis*, 3 Minn. 274. The record clearly shows that the petition was presented in a respectful manner, and that there was nothing in the language of the petition itself which would constitute a contempt, unless it could be established by evidence that it was used either with a reckless disregard of the truth, or with the express intention, not only to establish prejudice within the meaning of the statute, but also to reflect upon the honor, integrity, and character of the judge. It was therefore necessary to inquire and ascertain the meaning and intention of the parties in the premises. The intention of the parties was a material element in the offense. Rap. Contempt, § 121. Investigation was therefore necessary.

At the time this proceeding was instituted, chapter 31 of the Code of Civil Procedure, relating to contempts and their punishments, was in force. The court below

should in some measure, at least, have conformed with the rules prescribed by this chapter. The proceeding was instituted under its provisions. Section 348 expressly requires that, when the contempt is not committed in the immediate view and presence of the court, an affidavit shall be presented containing a statement of the facts constituting the contempt. No information is necessary, for the reason that it is the office of the affidavit to inform the court of the facts which constitute the foundation of the proceeding. *Worland v. State*, 82 Ind. 49.

In the absence of the affidavit the court is without the legal information necessary to warrant the issuance of the attachment. The judge cannot act upon mere hearsay statements. Knowledge must be brought home to him by the means prescribed by the statute. The statement of facts upon which the court may proceed must be verified by an oath. An information is not an affidavit, and cannot be substituted for an affidavit unless it is duly verified. The report of the committee appointed in this case could by no means perform the office of the affidavit. So far as this proceeding is concerned, the appointment of the committee and its action were extrajudicial. It may not be improper to initiate a proceeding to punish for constructive contempt by information. The affidavit will still be necessary, however, unless the information contains a statement of the facts and circumstances constituting the contempt. In such case the information simply performs the office of the affidavit prescribed by the statute. As the affidavit must of necessity be sworn to, it is clear that the information must be verified. In the absence of verification it is insufficient, and confers no jurisdiction upon the court to issue the attachment. *Gandy v. State*, 13 Neb. 445; *Wilson v. Territory*, 1 Wyo. 155; *Young v. Cannon*, 2 Utah, 560; *In re Daves*, 81 N. C. 72; *State v. Myers*, 44 Iowa, 580; *Batchelder v. Moore*, 42 Cal. 412;

Whittem v. State, 36 Ind. 196; *McConnell v. State*, 46 Ind. 298; *In re Judson*, 3 Blatchf. 148.

In the light of these authorities, it is clear that the court erred in overruling the motion to quash the information and the warrant of attachment, for the reason that the information was not verified.

It is unnecessary to consider other questions presented by the record. The judgment is reversed and plaintiff in error discharged.

REED and RICHMOND, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is reversed and the contempt proceeding ordered dismissed.

Reversed.

FIRST NAT. BANK OF CENTRAL CITY V. HUMMEL ET AL.

1. A TRUST FUND ON DEATH OF TRUSTEE REMAINS SUCH, THOUGH INTERMINGLED WITH OTHER MONEYS, AND DOES NOT BECOME GENERAL ASSETS OF THE ESTATE OF TRUSTEE.— Where, in pursuance of a previous understanding among all the parties, the plaintiff drew his draft upon a private banker for the amount of the indebtedness of a third party, who was to and did furnish the drawee with the funds to meet the same, and the draft was mailed by the plaintiff direct to the drawee, with directions to remit the proceeds to a certain bank for plaintiff's credit, but after receipt of the money and before its remittance to the bank named the drawee died, leaving the fund mingled with other moneys of his bank, these circumstances did not make the fund a part of the decedent's estate, and the plaintiff was entitled to recover the same by an action against the decedent's legal representative. Having been received in a fiduciary capacity by the drawee, a trust immediately arose in favor of the plaintiff by operation of law; and the mere fact that the fund became so intermingled with other moneys of the bank that the particular coin or bills of which it was composed could not be identified did not make it a part of the deceased's estate, but it retained its distinctive character as a trust fund, and the estate became chargeable with it as such on death of the trustee.

14	259
2a	572
14	259
19	125
14	259
5a	73
5a	464
7a	258
14	259
19a	325
14	259
137	157

3. **SAME — THE ADMINISTRATION STATUTES HAVE NO APPLICATION TO SUCH A CASE.**— The case is not affected by the statutory provisions relating to wills, and the administration of estates, for the reason that the fund in question never belonged to the deceased, and therefore constituted no part of his estate. The relation of debtor and creditor, as between the deceased and the payee of the draft, never having existed, the statutory provisions relating to the classification of claims against estates, and the order of their payment, have no application.
3. **PROPER PARTIES TO SUIT — REMEDY FOR REFUSAL OF ONE TO JOIN.** The party in whom the legal title to a claim is vested, and the party who is the beneficial owner of the claim as well, are proper parties to an action for its recovery; and where the consent of such a party to the use of his name as a joint plaintiff cannot be obtained, the statute authorizes the plaintiff to make him a defendant.
4. **UNITING DIFFERENT CAUSES OF ACTION — DEMAND OF PLAINTIFF FOR REIMBURSEMENT.**— A complaint by one in whom is vested the legal title only to the fund sued for does not improperly unite different causes of action, where, in addition to the prayer for judgment against the principal defendant for this fund, it asks that the beneficial owner of the fund, who declined to join in the action for its recovery as a party plaintiff, and for this reason was made a defendant, reimburse the plaintiff for all costs and expenses of the suit, that being the only relief prayed against him.

Error to District Court of Arapahoe County.

Messrs. HUGH BUTLER and A. B. MCKINLEY, for plaintiff in error.

Mr. A. H. DE FRANCE, for defendant in error.

PATTISON, C. In this case plaintiff in error seeks to review a judgment sustaining a demurrer to the complaint. It is alleged, in substance, that June 28, 1884, Risdon borrowed from one Heatly, then a resident of Golden, the sum of \$1,200, for which he gave his note secured by a trust-deed; that the money was not paid by Heatly to Risdon at the time, but an arrangement for the payment thereof was entered into between Heatly and Risdon and one Everett; that, by the terms of the ar-

arrangement, it was provided that Risdon should draw his draft at sight on Everett, at Golden, for said sum of \$1,200; that, upon the receipt of the draft, Heatly should provide the money to pay it, and that thereupon Everett should transmit the sum received from Heatly to Risdon, or make such other disposition of it as Risdon should direct; that on July 15, 1884, pursuant to the arrangement, Risdon made his draft upon Everett, "in and by which draft he directed the said F. E. Everett to pay said sum of \$1,200 to this plaintiff, and said Risdon then and there delivered said draft to this plaintiff, whereby the plaintiff became entitled to receive of and from the said Everett said sum of \$1,200 upon presentation and delivery of said draft;" that on the 16th day of July, 1884, the plaintiff sent the draft by mail to Everett, accompanied by a letter instructing him to remit the said sum of \$1,200 to the German National Bank, at Denver, Colo., for the benefit of the plaintiff; that on July 17, 1884, the draft and the letter were received at the banking office of Everett, in Golden, and at or about the same time the said Heatly paid into said banking office the sum of \$1,200, being the money called for and mentioned in the draft and letter of plaintiff, and the draft was then stamped and canceled as paid; that the said sum of \$1,200 was received by said Everett, or some one in his employ for him, as the money mentioned in the draft and letter, and was paid by Heatly, in pursuance of the arrangement mentioned; and that, under said arrangement, it was the duty and obligation of Everett to at once remit the said sum to the German National Bank of Denver for the credit of the plaintiff.

It is then alleged that, within a short time after the money was received, Everett suddenly died, and the bank was immediately closed, and no further business transacted therein, and that when Everett died, and when said bank was closed, the said sum of \$1,200 remained in the bank, and had not been remitted to the German National

Bank at Denver, as directed; that the bank was not opened thereafter.

It is further alleged that on November 12, 1884, the defendant Hummel took possession of the said banking office and its contents, and kept possession of the same; that, among other effects therein, he took possession, and has since had possession, of said sum of \$1,200; that thereafter, and on November 20, 1884, plaintiff demanded of Hummel the payment and delivery of said sum of \$1,200, but that he refused to pay the same.

It is then alleged, in effect, that, by the terms of the contract between plaintiff and Risdon, the plaintiff was to collect the draft, and, in case it was paid, and the amount thereof deposited in the German National Bank of Denver to the credit of the plaintiff, then plaintiff was to give Risdon credit for the sum of \$1,200; that on August 12, 1884, plaintiff informed Risdon that the draft had been paid by Heatly, but that its proceeds had not been remitted to the German National Bank of Denver, as requested; that the money was in the possession of the person in charge of Everett's property; and plaintiff then notified and requested Risdon to take early and proper steps for the recovery of the same; that Risdon refused to take such steps, and notified plaintiff that he should look to plaintiff only for said sum of money; that plaintiff requested Risdon to join as co-plaintiff in the suit; that he refused, and for that reason he was made a party defendant.

Judgment is demanded "that said Hummel deliver and pay over to the plaintiff said sum of \$1,200, together with interest thereon at the rate of ten per cent. per annum from said 20th day of November, 1884, and costs."

There is also an additional prayer, in the following language: "And demands judgment against John S. Risdon that he pay plaintiff a reasonable sum of money, sufficient to reimburse plaintiff for all costs and expenses

paid and incurred in the prosecution and maintenance of this suit, and for the recovery of said money; that he be adjudged the owner of said sum of \$1,200, less the expense of collection so found as aforesaid; and that plaintiff be released from any and all liability to said John S. Risdon by reason of making presentation and payment of said draft as aforesaid, and of all the other facts hereinbefore set forth."

To this complaint the defendant in error demurred upon the grounds—*First*, that the complaint did not state facts sufficient to constitute a cause of action; *second*, that there is misjoinder of parties defendant, etc.; *third*, that several causes of action have been improperly united, etc.; *fourth*, that the causes of action so improperly united are not separately stated.

The demurrer was sustained. Plaintiff in error "elected to abide by said complaint," and thereupon the judgment was rendered now sought to be reviewed.

The causes of demurrer will be considered in the order in which they have been stated.

First, then, are the facts alleged sufficient to constitute a cause of action against the defendant in error? In other words, upon the facts stated, is plaintiff entitled to the judgment demanded, or to any judgment or relief in the premises whatever?

In the discussion of this question it will be necessary, first, to define the relation of the several parties to the fund in question. That relation must be determined from the facts as alleged in the complaint. The facts, then, are that on June 28, 1884, Heatly agreed to loan to Risdon \$1,200. On that day Risdon made his note, and delivered the same to Heatly. The money to be loaned was not paid over by Heatly to Risdon. It was arranged that, on July 15th following, Risdon should be paid by Heatly. To accomplish this, it was agreed between Heatly, Everett and Risdon that, on the day named, Risdon should draw a draft on Everett, which Everett

should pay if Heatly provided the funds for payment. Pursuant to the arrangement, Risdon drew his draft upon Everett, and delivered it to the plaintiff. It is a fair inference from the allegations of the complaint that the draft was payable to the order of the plaintiff. The plaintiff sent the draft to Everett with instructions that, when Heatly paid the money to him, he (Everett) should transmit the money received from Heatly to the German National Bank for the credit of the plaintiff.

Upon this state of facts, the relations between the several parties are clear and well defined. Risdon made the plaintiff in error his agent to obtain the fund in question. The plaintiff made Everett its agent to receive the fund from Heatly. When he received the fund, it was his duty to transmit the identical money received to the German National Bank for the credit of the plaintiff. When the money was paid by Heatly to Everett, therefore, the title to the fund was vested in the plaintiff. The beneficial ownership was vested in Risdon; Everett had no title or interest in the money, or any part of it. His failure, therefore, to transmit the money received from Heatly to the German National Bank was a violation of the duty he owed the plaintiff and Risdon. When he received the money, it became the money of the plaintiff and Risdon. When he died, the fund was their property, and was their property when received by defendant in error.

The question presented upon these facts is whether this sum of \$1,200 can be recovered. The action is brought against the defendant in error individually. It will be assumed, however, that the fund was taken by him as the personal representative of the decedent. The case will first be considered without reference to the statute of this state relating to the administration of estates of deceased persons. It was conceded by counsel for defendant in error, upon the oral argument, that, if this specific sum of \$1,200 could be identified in any way,

then the action could be maintained. But it was insisted, if the fund when received was mingled with other funds belonging to decedent so that its identity was lost, then, and in that event, no action could be maintained to recover it. This proposition was predicated upon the principle that money, as such, cannot be recovered, because, in the language of the books, it has no "ear-mark" by which it can be distinguished. If this principle can be successfully invoked in this case, then a fund to which decedent had no title, and in which he had no beneficial interest whatever, became a part of the body of his estate to be distributed among the general creditors. If the estate of Everett is insolvent, such a result would not only be inequitable and unjust, but a reproach to the law.

It is undoubtedly true that the principle contended for was at one time so well settled as to be elementary. It is clearly stated in Schouler, Ex'rs, § 205. Attention is only called to two clauses of this section: "Only those things in which the decedent had a beneficial interest at his death are assets, and not those which he holds in trust, or as the bailee or factor of another. In order, however, that the third party or new fiduciary may claim his specific thing as separable from assets, its identity should have been preserved; and the rule is that, if the deceased held money or other property in his hands belonging to others, whether in trust or otherwise, and it has no ear-mark, and is not distinguishable from the mass of his own property, it falls within the description of 'assets,' in which case the other party must come in as a general creditor." In support of the proposition last quoted the author cites two cases: *Trecothic v. Austin*, 4 Mason, 29; *Johnson v. Ames*, 11 Pick. 172. The first case was decided in 1825; the second in 1831.

It is needless to trace the development of the law which has resulted in a radical change in the principle stated since these decisions were made. At this time the

owner of money which has been received by another as trustee, or in any fiduciary capacity, can undoubtedly recover the money or its equivalent whenever the same can be followed, no matter what form it may take.

The departure from the rigid doctrine of "ear-mark" or identification of money, to entitle the owner to recover, seems to have been first initiated in England. As the English cases cited have been very generally followed by the courts of this country, attention will be first called to them. The case of *Pennell v. Deffell*, 4 De Gex, M. & G. 372, was a controversy between creditors and the administratrix of one George Green, who in his life-time was one of the official assignees of the court of bankruptcy. It is only necessary to say that, in the course of the administration of his office, the deceased was accustomed to mingle trust funds with his own, and to deposit the same in bank.

In the discussion of the proposition in question, Lord Justice Knight Bruce uses the following hypothesis: "Thus, let me suppose that the several sums for which, as I have said, Mr. Green was accountable at the time of his death, had been (that is to say, that the very coins and the very notes received by him on account of the trusts, respectively, had been) placed by him together in a particular repository, such as a chest, mixed confusedly together as among themselves, but in a state of clear and distinct separation from everything else, and had so remained at his death. It is, I apprehend, certain that after his death the coins and notes thus circumstanced would not have formed part of his general assets,—would not have been permitted so to be used,—but would have been specifically applicable to the purposes of the trusts on account of which he had received them. Suppose the case that I have just suggested to be varied only by the fact that, in the same chest with these coins and notes, Mr. Green had placed money of his own—in every sense his own—of a known amount, had never taken it

out again, but had so mixed and blended it with the rest of the contents of the chest that the particular coins or notes of which this money of his own consisted could not be pointed out—could not be identified. What difference would that make? None, as I apprehend, except, if it is an exception, that his executors would possibly be entitled to receive from the contents of the repository an amount equal to the ascertained amount of the money in every sense his own so mixed by himself with the other money. But not in either case, as I conceive, would the blending together of the trust moneys, however confusedly, be of any moment as between the various *cestuis que trustent* on the one hand, and the executors, as representing the general creditors, on the other.”

In the same case Lord Justice Turner said: “It is, I apprehend, an undoubted principle of this court that as between *cestui que trust* and trustee, and all parties claiming under the trustee, otherwise than by purchase for valuable consideration, without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subjected to or affected by the trust.”

Again, in *Knatchbull v. Hallett*, L. R. 13 Ch. Div. 696, a most exhaustive discussion of this question is found. At page 710, Jessel, Master of the Rolls, said: “Now, that being the established doctrine of equity on this point, I will take the case of the pure bailee. If the bailee sells the goods bailed, the bailor can in equity follow the proceeds, and can follow the proceeds wherever they can be distinguished, either being actually kept separate, or being mixed up with other moneys. I have only to advert to one other point, and that is this: Supposing, instead of being invested in the purchase of land or goods, the moneys were simply mixed with other moneys of the trustee, using the term again in its full sense, as includ-

ing every person in a fiduciary relation, does it make any difference, according to the modern doctrine of equity? I say, none."

At page 723, Theisiger, L. J., said: "There is no doubt that there are to be found, here and there in the books, *dicta*, principally of common-law judges, which would appear to militate against the generality of that proposition, and which would appear to show that, in the minds of those judges, there was the view that, while chattels might be followed, or money so long as it could be looked upon as a specific chattel, as moneys numbered and placed in a bag, yet, when those moneys had been mixed with other moneys, that there was no ear-mark, and neither at law nor in equity could they be followed. With reference, however, to those *dicta*, it appears to me there are two observations to be made: In the first place, I cannot find any decision which has followed out those *dicta* to their consequence, assuming that those *dicta* are to be treated as having the generality which at first sight attaches to them; and, in the second place, it appears to me that in many cases those *dicta*, looking to the facts of the particular case, may be restrained to those facts, and possibly may have a more limited meaning than that which has been attached to them by Mr. Justice Fry in the case of *Ex parte Dale*, L. R. 11 Ch. Div. 772, or by the master of the rolls in his judgment in the present case. As far as I can judge, the only exception to the general proposition which I have stated is not a real exception, but an apparent exception; for all cases where it has been held that moneys mixed and confounded, but still existing, in a mass, cannot be followed, may, I think, be resolved into cases where, although there may have been a trust with reference to the disposition of the particular chattel which those moneys subsequently represented, there was no trust, no duty, in reference to the moneys themselves, beyond the ordinary duty of a man to pay his debts. In other words, that they were cases

in which the relationship of debtor and creditor had been constituted, instead of the relation either of trustee and *cestui que trust*, or principal and agent."

At page 713, *Knatchbull v. Hallett, supra*, the master of the rolls says: "Now, let us see, therefore, what *Whitecomb v. Jacob* decides. It decides that the equity as to following the proceeds attaches to the case of a factor as well as to the case of *cestui que trust* and trustee. That is what it decides; but it decides, secondly, that you could not follow money, because it had no ear-mark. The first part is good law at the present day, the second is not. Whether it was a good law or not at the time of *Salkeld*, it is immaterial to consider. It is very doubtful whether equity had got quite so far at that date as since, and therefore I will not say it was not; but it is not so now."

This case is cited with approval in *National Bank v. Insurance Co.* 104 U. S. 54, in which this and many of the English cases are reviewed. In the syllabus of the case last cited the rule is stated as follows: "As long as trust property can be traced and followed, the property into which it has been converted remains subject to the trust; and, if a man mixes trust funds with his, the whole will be treated as trust property, except so far as he may be able to distinguish what is his. This doctrine applies in every case of a trust relation, and as well to moneys deposited in bank, and to the debt thereby created, as to every other description of property." *Van Alen v. Bank*, 52 N. Y. 1.

Again, in *Bank v. King*, 57 Pa. St. 202, it is held: "Equity will follow a fund through any number of transmutations, and preserve it for the owners, so long as it can be identified, no matter in whose name the legal right stands." Strong, J., says: "But it is insisted there was no ear-mark to the money. What of that, if the money can be followed, or if it can be traced into a substitute? This is often done through the aid of an ear-

mark. But that is only an index enabling a beneficial owner to follow his property. It is no evidence of ownership. An ear-mark is not indispensable to enable a real owner to assert his right to property, or to its product or substitute. Evidence of substantial identity may be attached to the thing itself, or it may be extraneous. It is freely admitted that, if a trustee or agent receive money of a *cestui que trust* or principal, and mingle it with his own so that it cannot be followed, the *cestui que trust* or principal cannot recover it specifically. This is not because the ownership is changed, but because a court cannot lay hold of the property as that of the owner. But, in regard to money, substantial identity is not oneness of pieces of coin, or of bank-bills. If an agent to collect money puts the money collected into a chest where he has money of his own, he does not thereby make it all his own, and convert himself into a mere debtor to his principal. The principal may, by the law, claim out of the chest the sums which belonged to him before the admixture. *Pennell v. Deffell, supra.*"

In *Peak v. Ellicott*, 30 Kan. 156, Horton, C. J., says: "Counsel suggest: 'If there was a trust created, there must have been a *cestui que trust*, and that, if any one is entitled to follow and reclaim the money, it must be the owner and holder of the note of plaintiff.' It does not make any difference that, instead of trustee and *cestui que trust*, the case is one of fiduciary relationship. If a wrong arises out of such relationship, the same remedy exists against the wrong-doer on behalf of the principal as exists against a trustee on behalf of the *cestui que trust*. Wherever a fiduciary relationship exists, and money coming from the trust lies in the hands of the person standing in that relationship, it can be followed by the principal, and separated from any money of the wrong-doer."

In *McLeod v. Evans, Assignee*, 66 Wis. 401, the rule contended for by counsel for defendant in error was, after

a careful discussion by Cole, C. J., practically repudiated. The proposition decided is thus stated in the syllabus: "M. left with H., a banker, for collection, a draft upon a New York bank. H. sent the draft to a bank in Chicago, received credit for the amount, and afterwards made drafts upon such bank, which were cashed. Before payment to M., H. made an assignment for the benefit of creditors. At that time nothing was due him from the Chicago bank. Held, that the proceeds of the draft were a trust fund in the hands of H., and that, as against other creditors, M. might enforce full payment from the assets in the hands of the assignee, although the trust fund could not be traced to any specific property." *People v. City Bank of Rochester*, 96 N. Y. 32.

No one of the cases cited differs in principle from the case at bar. Suppose the money in question had been placed by Everett in his own pocket, with a mass of other funds belonging to himself, and that he had then died. Suppose that immediately upon his death the mass of currency had been taken into the possession of the defendant in error. If demand had then been made by the plaintiff for the money, could defendant in error have required the plaintiff in error to designate the particular bills which were claimed as a condition of the right to recover them? Certainly not. How does the case supposed differ from the case at bar? It is alleged that the money was paid to Everett, received and retained by him; that it was in his possession at the time of his death; that the same sum came to the possession of the defendant in error. Is it not clear that Everett received the fund in a fiduciary capacity? Does it not follow that the instant it passed into his hands a trust arose, by operation of law, in favor of plaintiff in error? Did not the trust follow the fund when it passed to the hands of defendant in error? If it was mingled with the assets of the decedent, is not the estate impressed with the same trust? Can it be possible that the fact of death increases

a man's estate by adding thereto all property which may be in his hands? Can a man, by an abuse of trust or violation of his fiduciary relations, acquire moneys for distribution among his general creditors at his decease? Whatever may have been the law applicable to these questions in the past, it is clear that at the present time the estate of no man can be increased by a wrong committed by him under the circumstances set forth in the complaint in this case.

Is the conclusion reached in any wise affected by sections 126 and 136 of the statute of this state relating to wills and administration of estates? It will be observed in this connection that the question at issue is one of title. The conclusion already reached is that at the time of the death of Everett the title to the fund in controversy was in the plaintiff in error; that Everett had no beneficial interest therein whatever. The fund, therefore, constituted no part of his estate. Schouler, Ex'rs, § 205.

It is contended by defendant in error, however, that the sections of the statute cited have the effect, in law, to convert the fund in question into assets by their operation in the classification of claims, and the order of their payment. The third subdivision of section 126 provides that, "where any executor, administrator or guardian has received money as such, his executor or administrator shall pay out of his estate the amount thus received and not accounted for, which shall compose the third class." The fourth subdivision provides that "all other debts and demands, of whatsoever kind, without regard to quality or dignity, which shall be exhibited within one year from the granting of letters as aforesaid, shall compose the fourth class." Section 136 relates to the order of payment, and requires that claims be paid according to the classification contained in section 126.

It is claimed, first, that the fund in question does not belong to the third class, because debts of the third class

are limited to moneys which have been received by the decedent as executor, administrator or guardian. This is undoubtedly true. As a natural sequence, it is argued that the demand in issue in this suit is a debt, and belongs to the fourth class. If the plaintiff in error was proceeding against the defendant in error as a general creditor, then, as a matter of course, the position of defendant in error would be correct. Such, however, is not the case. The relation of debtor and creditor, as between plaintiff in error and Everett, never existed. The statute, therefore, has no application. The ultimate fact upon which the right of action in the case at bar is predicated is that the funds in question were never the property of Everett at all; that neither the legal title nor the beneficiary interest vested in him; that the identical fund was in his possession at the time of his death, and that the same fund came to the defendant.

Prior to 1872 the provision of the statute of Illinois classifying claims against the estate of a deceased person was identical in language with that of this state. In the year last mentioned the legislature of Illinois amended that provision so that it reads as follows: "(6) Where the decedent has received money in trust for any purpose, his executor or administrator shall pay out of his estate the amount thus received and not accounted for." In the case of *Wilson v. Kirby*, 88 Ill. 566, it was held that "the clause of the statute relating to the classification of claims against estates of deceased persons, and which gives a preference in cases where the deceased has 'received money in trust for any purpose,' does not necessarily extend to and embrace every kind of trust. It does not embrace trusts implied by the law." The same case was before the supreme court of Illinois a second time, and is reported in 98 Ill. 240. It was there held that, "where a person sells the cattle of another as his agent, under a contract, and receives and retains the purchase money until his death, it becomes the money

of the owner of the cattle, as the substitute or representative of the cattle; and the fact that the widow of the person so selling, during his illness or after his death, takes such funds, and deposits the same in bank in her own name, and afterwards gives her check for the same to her husband's executor, will not destroy the identity of the fund, and make it subject to the general creditors of the testator, but the owner of the cattle so sold will have a preference over the other general creditors of the estate. In such case it is not necessary that the identical bills received by the testator should have come into the hands of his executor." Upon examination of this case it will be discovered that the decision is based upon the sole fact that the money in controversy was the money of the owners of the cattle, and that the section of the statute cited is without application, for the reason that, as was said by the court (*Wilson v. Kirby, supra*), the statute does not embrace trusts implied by the law.

In the decision of this case, therefore, the provisions of our statute which have been cited should be disregarded, and the conclusion predicated upon the legal and equitable principles which have been discussed. In the light of these principles, it is clear that the complaint states a cause of action.

The next question presented is whether John S. Risdon was improperly joined as a defendant. It is claimed that, if plaintiff in error was the real party in interest, Risdon could not be properly joined either as plaintiff or defendant. The relation of the parties to each other was as follows: (1) Risdon was one of the original parties to the contract or arrangement upon which the action was predicated, to wit, the payment of \$1,200 by Heatly to Everett for him. (2) The plaintiff was the agent of Risdon for the purpose of collecting the money to be paid by Heatly to Everett, and had the legal title to the draft which was drawn, and the right in the first instance to receive the money; but Risdon was the beneficial owner

of the fund. This being the relation of the parties, the question of parties plaintiff does not seem to be difficult. Section 3 of the code, which was in force when this action was brought, provides that "every action shall be prosecuted in the name of the real party in interest, except as otherwise provided." Section 5 provides that the trustee of an express trust may bring an action without joining beneficiaries, and that a trustee of an express trust includes a person in whose name a contract is made for the benefit of another. Section 10 declares that "all persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs." Section 12 provides that, "of the parties to the action, those who are united in interest shall be joined as plaintiffs or defendants; but, if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint."

The meaning of the language of the first section cited has been frequently construed by the courts. The "real party in interest" is held to mean the person in whom the legal title to the claim in suit is vested. *Bassett v. Inman*, 7 Colo. 270, and cases cited. The suit, therefore, was properly brought in the name of the plaintiff. But, inasmuch as Risdon was a party to the contract upon which the action was predicated, and was in fact the beneficial owner of the claim, he must be deemed to be interested in the subject of the action, within the meaning of section 10, above cited, and therefore a proper party plaintiff in the suit.

In commenting upon the section last mentioned, Pomeroy, in his work on Remedies and Remedial Rights, at section 199 says: "The extent of the interest is not the criterion, nor its source, nor origin. If the persons have any interest — whether complete or partial, whether absolute or contingent, whether resulting from a common share in the proceeds of the suit or arising from the stip-

ulations of the agreement — the language applies, without any limitation or exception, and without any distinction suggested between actions which are equitable and those which are legal." All persons standing in the relation to the subject-matter of the action as above defined may be properly joined as plaintiffs. In this particular case, Risdon refused to unite with plaintiff, and was properly joined as defendant.

It is also contended that different causes of action are improperly united. This position cannot be sustained, for the simple reason that no cause of action is stated against Risdon. As a part of the prayer for relief, the court is asked to allow the plaintiff a reasonable sum for its costs and expenses, and to require this amount to be paid to plaintiff by Risdon. No attempt is made to state a cause of action against him. The only allegations are those which are made in compliance with section 12 of the code, as the reason for making Risdon a party defendant. Two causes of action, therefore, are not improperly united; there being but one cause of action stated. The judgment is reversed.

RICHMOND and REED, CC., concur.

MR. JUSTICE ELLIOTT. Having heard and determined this case in the court below, I have given the foregoing opinion careful consideration. At *nisi prius* I must have overlooked some of the averments of the complaint showing that Everett was, by the previous arrangement of the parties, constituted a trustee of the particular fund paid to him by Heatly, for the express purpose of being immediately paid over to Risdon or his order. The judgment should be reversed.

PER CURIAM. For the reasons expressed in the opinion of Mr. Commissioner PATTISON the judgment of the district court is reversed, with leave to defendants below to answer the complaint.

Reversed.

HAMILL V. WARD.

14	277
14	539
14	277
5a	129

CONTRACTS — JOINT AND SEVERAL OBLIGATIONS.— Under Civil Code, section 13, and General Statutes, section 1834, making joint instruments several also, the holder of a note who sues the maker and indorser as joint makers, dismisses as to the indorser, without prejudice, and obtains judgment against the maker, may afterwards sue the indorser.

Appeal from Superior Court of Denver.

ACTION on promissory note.

Mr. R. S. MORRISON, for appellant.

Mr. J. W. HORNER, for appellee.

RICHMOND, C. June 17, 1884, O. H. Rothacker made his promissory note, payable four months after date, to the order of W. A. Hamill, for the sum of \$914.76, with interest at ten per cent. per annum. This note Hamill indorsed to the Rounds Type & Press Company.

December 19, 1884, appellee herein, and plaintiff below, Samuel D. Ward, as assignee of the Rounds Type & Press Company, brought suit in the superior court of the city of Denver against Rothacker and Hamill, alleging that they were joint makers of the note.

To this complaint Hamill interposed a demurrer. The grounds of the demurrer do not appear in the abstract or transcript of record; but in the brief of appellee we are informed that the grounds of demurrer were "that it did not appear by the complaint that defendant Hamill was liable as joint maker." The demurrer was sustained. Thereupon, upon motion of plaintiff, it was ordered by the court that the cause be dismissed as to defendant Hamill, at the cost of plaintiff; said dismissal to be without prejudice as to the rights of plaintiff against said defendant Hamill.

Default was taken against Rothacker, and judgment

entered for the full amount of the note, with interest. Execution was issued, and \$500 obtained.

April 7, 1885, plaintiff instituted this action against Hamill to recover the balance due on the note, alleging the proceedings above recited, the insolvency of Rothacker, and that there now remained due and unpaid the sum of \$542.40.

The answer of defendant sets up previous suit, alleging that plaintiff had elected to proceed against Hamill and Rothacker as joint makers; that he obtained judgment against Rothacker as a joint maker; and therefore is barred from proceeding against the defendant Hamill in this action as indorser.

To this answer plaintiff replies, admitting that the original complaint charged Rothacker and Hamill as joint makers; but says that it is not true that in subsequent proceedings Rothacker and Hamill were charged as joint makers, or that judgment was taken against Rothacker as joint maker.

Trial by the court, and judgment for plaintiff in the sum of \$568, to which defendant duly excepted, and prosecutes this appeal.

Neither the transcript nor the abstract contains the record evidence introduced in the trial court; therefore objections relating thereto will not be considered. In the abstract of the bill of exceptions it is recited that plaintiff offered in evidence the execution and return in the case of *Samuel D. Ward, assignee, v. O. H. Rothacker* (No. 963), which shows that a levy had been made, and that execution was returned satisfied to the extent of \$447.60 and costs, and unsatisfied as to \$540.40; that plaintiff offered record of judgment and the papers and proceedings in case No. 963. It is further recited that of the amended complaint in No. 962 a few paragraphs are the only ones material to the consideration of this case, and are those upon which the defense and appeal are based. By this amended complaint (if it be a part of the

record in 963 instead of 962) it appears that defendants were proceeded against as joint makers, yet it also appears in the record that the demurrer was interposed to the complaint, and that plaintiff obtained leave to further amend complaint, and thereafter the order of dismissal, without prejudice, was entered. The contention of appellant is that plaintiff cannot have judgment against Rothacker as a joint maker with Hamill, and follow with a suit against Hamill as indorser. It is undoubtedly true that at common law a judgment against one of two joint promisors is a bar to an action against both jointly, and is also a bar to an action against the other.

"Parties cannot be sued separately, for they have incurred no separate obligation. They cannot be sued jointly, because judgment has already been recovered against one who would be subjected to two suits for the same cause." "But, where the liability is joint and several, a judgment against one does not preclude procedure against the other or others." 2 Daniel, Neg. Inst. § 1296.

By statute, however, in this state, joint instruments, including promissory notes, are declared to be several also (Civil Code, § 13; Gen. St. § 1834); and, under said section 13, the separate obligation of the indorser or surety is made so far joint as to permit the adjudication of their respective liabilities in the same action. Bliss, Code Pl. (2d ed.) § 93 *et seq.*; Pom. Rem. § 194 *et seq.* But this is optional with plaintiff, and, upon the dismissal of the former suit as to Hamill without prejudice, his liability in the present action remained unaffected.

But it may be claimed that section 107 of the General Statutes is (notwithstanding the code provision above mentioned) still in force in this as well as in other particulars. Upon this question we need not pass, for the reason that it is unimportant. If we assume that said section 107 is in force and applicable to the present case, there has been such a compliance with every material requirement thereof as perfects the liability of Hamill.

He was the assignor of the promissory note, and since plaintiff exercised due diligence in prosecuting his action against the maker, and endeavoring by execution to thus make his debt, his right to proceed in this suit against Hamill for the uncollected balance cannot be questioned.

The judgment is affirmed.

REED and PATTISON, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

Affirmed.

JORDAN, IMPLEADED, ETC., V. McNULTY ET AL.

1. PARTITION OF REAL ESTATE — NECESSARY PARTIES — PLEADINGS.— In a proceeding under the statute for the partition of real estate, it is only necessary, at least in the first instance, to make those persons parties who are interested in the property as joint tenants, tenants in common or coparcenary. Lessees having no definite or subsisting leasehold interest in the premises sought to be partitioned are not necessary parties, and an answer which avers that a lease had been granted "prior to the commencement of this suit," and that the lessees "have been in possession," etc., without disclosing the terms, duration or continued existence of the lease, is insufficient to require the supposed lessees to be made parties.
2. REFUSAL OF COMMISSIONER TO ACT — SUBSTITUTION OF ANOTHER WITHOUT NOTICE.— Where a commissioner appointed by the court under the provisions of the statute to make partition declines to serve, the court may substitute another person in his place without giving notice to the parties. If the appointee be objectionable by reason of coming within any of the exceptions enumerated in the statute, the objection may be raised after the appointment, or it may be interposed as an objection to the report before its confirmation.
3. IRREGULARITIES WHICH MAY BE CURED — FAILURE IN THE FIRST INSTANCE TO TAKE THE OATH NOT A REVERSIBLE ERROR.— Where the commissioners appointed to make partition of lands view the premises before one of them has taken the oath prescribed by the statute, and their report is filed, which for some reason is not confirmed, and afterwards the commissioner takes the oath before the filing of the final report, the filing of the first report does not render the commission *functus officio*, nor is the failure to take the oath before viewing the premises a reversible error.

Appeal from District Court of Clear Creek County.

Mr. W. T. HUGHES, for appellant.

Mr. R. S. MORRISON, for appellees.

RICHMOND, C. McNulty and Noone filed a complaint for partition of certain mining property. Jordan and Ryan were made parties defendant. Ryan demurred to the complaint, and afterwards withdrew the demurrer and permitted default to be entered. Jordan answered, and, among other things, set up the fact that all of the parties had agreed to and did lease the premises sought to be partitioned prior to the commencement of this action.

Thereafter the court appointed three commissioners to partition the land. At a subsequent term of the court, one of the commissioners having declined to act, the court appointed one G. W. Hall in his place. On the 20th of June, 1886, the commissioners filed a report. This report was objected to by Jordan, for the principal reason that Hall had not taken the oath prescribed by the statute. What, if any, action was taken by the court concerning this report, does not appear by the transcript or abstract of record. But it is fair to assume, from the record, that the report was not received, because the record discloses that a third report was subsequently filed. It also discloses the fact to be that, prior to the filing of the third report, Commissioner Hall took the prescribed statutory oath. No objection was made to the conclusion of the commissioners, nor to their conduct. It would seem, from the transcript, abstract and arguments, that the proceedings of the commissioners were regular and in conformity with the statute, save and except the one fact that Hall took the oath prescribed by the statute, after viewing the premises to be partitioned and before making the final report. This was the main objection relied upon by appellant in the oral argument before the court.

It is also urged that the lessees were necessary parties to this proceeding, and, further, that Hall's appointment was made without notice to appellant. Section 280, chapter 24, Code (Gen. St. 1883), provides that "when any lands, tenements or hereditaments shall be held in joint tenancy, tenancy in common or coparcenary, whether such right or title be derived by purchase, devise or descent, or whether any, all or a part of such claimants be of full age or minors, it shall be lawful for one or more of the persons interested * * * to present to the district court of the county where such lands or tenements lie * * * their petition, praying for a division and partition. * * *" "Sec. 282. Every person having such interest as is specified in this chapter, whether in possession or otherwise, and every person entitled to dower in such premises, if the same has not been admeasured, shall be made a party to such petition." "Sec. 284. All persons interested in the premises of which partition is sought to be made according to the provisions hereof, whose names are unknown, may be made parties to such petition by the name and description of unknown owners or proprietors of the premises, or as the unknown heirs of any person who may have been interested in the same."

By the above provisions it seems that the only necessary parties, at least in the first instance, in proceedings of this nature, are those who hold a joint tenancy, tenancy in common or coparcenary. Besides, from the abstract of the record under which this appeal is prosecuted according to the act of 1885, it does not appear that the alleged lessees had any definite or subsisting leasehold interest in the premises sought to be partitioned. An answer which avers that a lease had been granted "prior to the commencement of this suit," and that the lessees "have been in possession," etc., without disclosing the terms, duration or continued existence of the lease, is not sufficient to require the supposed lessees to be made par-

ties to the proceeding for partition under the provisions of the statute.

The next objection to the report and its confirmation that we shall consider is the absence of notice to appellant of the intention of substituting Hall in place of the commissioner who had declined to act. Section 288 provides that "the court, when it shall order a partition of any premises to be made under the provisions hereof, shall appoint three commissioners, not connected with any of the parties either by consanguinity or affinity, and entirely disinterested. * * *"

No objections were interposed that Hall was related directly or indirectly, or in any way interested in the proceedings. Ordinarily, courts prefer to make the appointment of such individuals with the consent of the parties to the proceedings, but we can conceive of many circumstances which would justify a court in making appointments without such acquiescence, when the parties appointed do not come within the exceptional provisions of the law, and we are justified in assuming that such circumstances existed at the time Hall was appointed. The statute does not contemplate, nor does the practice in such cases warrant the court in giving, notice of its purpose to comply with the mandatory provisions of the statute. If Hall was objectionable because he came within the exceptions above enumerated, the objection could have been raised as well after as before his appointment. It could have been interposed as an objection to the report before confirmation. We think there was no error in the failure of the court to give notice as claimed by appellant.

The next and most serious question is the objection raised that the oath prescribed by the statute was not taken by Hall previous to entering upon the duties of commissioner. A careful examination of the authorities inclines us to the opinion that this, of itself, is not sufficient to warrant us in reversing the judgment of the

court. The statute provides that the commissioner "shall take an oath, before the court or some justice of the peace, fairly and impartially to make partition of said lands in accordance with the judgment of the court," etc. Code Civil Proc. 1883, § 288. It appears that the first report was filed before Hall had taken his oath as commissioner, and it is suggested that, the commissioners having filed a report, they became *functus officio*, and any subsequent act would not cure the objection of failure to take the oath. We cannot concur in this position. In *Freem. Co-tenancy*, § 526, the doctrine is announced that, if the report be set aside for the misconduct of the commissioners or any of them, new ones may be appointed in their places. "If for a mere irregularity or unintentional omission to perform some duty, such as to give notice to the parties or to take the oath prescribed by statute, the same commissioners will be retained, and proceed a second time to execute the order for partition." If any irregularity has been committed by the commissioners, or they have exceeded their authority, or acted fraudulently or unfairly, any party dissatisfied may move, on the usual notice, to set aside the report. This the court has power by statute to do, and to appoint new commissioners, who are to proceed in like manner. * * * The causes for setting aside a report are, of course, various. * * * It is said that it will not be disturbed except upon grounds similar to those upon which a verdict would be set aside and a new trial granted. *Doubleday v. Newton*, 9 How. Pr. 71. * * * For an unintentional omission to * * * take the oath required by statute, the same commissioners will be retained and proceed a second time to execute the order for partition." 2 Van Santv. Eq. Pr. 47.

There is nothing in this case tending to show the slightest impropriety on the part of the commissioners,—no objection that the recommendations presented in the report were not equitable and eminently proper;

and the mere omission to take the oath prescribed is, in our judgment, such an irregularity as could be readily cured, and was cured, by a re-reference of the matter to the commissioners, and the taking of the oath by Commissioner Hall, prior to the filing of the report which was subsequently confirmed by the court. Having once viewed the premises, being thoroughly familiar with the situation, and finding that the premises were not susceptible of a division, without manifest prejudice to the owners, a further view of the premises was unnecessary. The commissioners had met together upon the premises, had consulted upon the matter of the partition, and had arrived at a conclusion. This, we think, was a substantial compliance with the provisions of the statute.

It has been held, in some instances, that a report of the commissioners need not necessarily be signed by all three. In the case of *Kane v. Parker*, 4 Wis. 123, it was held that the signature of the three commissioners to the report is not essential. The court said: "It is true that he [one of the commissioners] did not sign and acknowledge this report with the other commissioners, nor was it necessary for him to do so. If he met and acted with the other commissioners in making the partition, it was sufficient. His neglecting to sign and acknowledge the report does not do away with the presumption arising from the above circumstances, that he did meet and act with the other commissioners in making the partition." See, also, *Underhill v. Jackson*, 1 Barb. Ch. 73.

We find no error in the action of the court in confirming the report of the commissioners. The judgment should be affirmed.

REED and PATTISON, CC., concur.'

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

Affirmed.

TODD V. STEWART.

1. ELECTION CONTESTS — PLEADINGS AND PRACTICE IN SUPREME COURT.
A general averment of election frauds or the intimidation of voters is insufficient; under the rules of this court in relation to election contests, proper ultimate facts must be pleaded as in other cases.
2. CHARACTER OF EVIDENCE REQUIRED IN SUCH CASES.— Mere rumors circulated and arguments advanced against particular candidates during political campaigns, however false or malicious, cannot affect the determination of such cases.
3. WHAT CONTESTOR MUST SHOW.— If the contestor does not show that by reason of the illegal casting or rejection of votes the result is different from what it would otherwise have been, the proceeding should not be entertained.

Original Contest Proceeding.

Mr. GEORGE R. TODD, *pro se*.

MESSRS. STIMAN & EMERSON, JOHN KINKAID and S. L. CARPENTER, for contestee.

CHIEF JUSTICE HELM delivered the opinion of the court.

Contestor and contestee were opposing candidates at the last general election for the office of county judge of Ouray county. Contestee received the certificate of election, and the present proceeding is instituted to try his right to the office.

The principal ground of contest stated by the petition is that in the registration of voters in six election precincts of Ouray county, preceding the election referred to, some of the specific requirements of the statute were not complied with by the boards of registration. The petition also avers, generally, that in four of the six election precincts mentioned, corruption, fraud and intimidation were practiced. But the only specific acts of corruption, fraud or intimidation mentioned are: *First*, the striking off of twenty-seven or twenty-eight names from the poll-book, thereby depriving such persons of

the privilege of voting; *second*, the action of certain mine owners and managers, who endeavored to turn the votes of their employees against contestor by unfair argument and implied threats of discharge from employment; *third*, the circulation by contestee and his law partner of the report that a certain independent ticket containing the name of contestor was fraudulent, whereby numerous persons were prevented from exercising their free choice for the office of county judge.

The foregoing petition is challenged by demurrer upon the ground that no sufficient cause of contest is therein stated, and also upon the ground that the same is ambiguous, unintelligible and uncertain.

A general averment of election frauds, or the intimidation of voters, should be treated as insufficient; and the pleading of proper ultimate facts should be required, under the rules of this court, in election contests, as in other cases. The allegation that twenty-seven or twenty-eight names were stricken from the poll-book does not aid contestor, since there is no averment that the parties thus prevented from voting would have cast their ballots for him. The alleged reprehensible conduct of mine owners and managers would, if true, be a proper subject for denunciation by good citizens, and possibly for legislative action; but it is not within the realm of judicial cognizance in determining election contests. Nor can rumors circulated or arguments advanced against particular candidates during political campaigns, however false or malicious, affect the determination of such cases.

The sole remaining ground of contest rests upon contestor's assertion that the specific requirements of the law in relation to the registration of voters are conditions precedent to a legal ballot, and that where any of these requirements are omitted, either through ignorance, inadvertence or evil design, the registration is void, the votes cast are illegal, and the returns should not be counted. Without passing upon the correctness of the

foregoing propositions, we must hold that the petition is in this respect, also, insufficient; for, if we assume (for present purposes only) that contestor's position is sustained by authority, nevertheless, certain other matters must be averred and proved in order to successfully contest an election.

If contestor does not show that, by reason of the illegal casting or rejection of votes, the result is different from what it would otherwise have been, the contest proceeding should not be entertained. Cooley, Const. Lim. (5th ed.) 780; McCrary, Elect. (2d ed.) § 281; *First Parish v. Stearns*, 21 Pick. 148; *People v. Cicott*, 16 Mich. 282.

The petition under consideration does not state the total number of votes cast in the county for the office in controversy, at the election mentioned, nor the total number of votes polled in either or all of the six precincts complained of. It does not state the number of candidates in the field for said office, nor the number of votes given for either of the candidates. It does not state, or attempt to state, the number of electors who were prevented from casting their ballots for contestor by reason of fraud, intimidation or other misconduct. It does not even specifically aver that the board of canvassers considered or counted the returns from the six precincts objected to. In short, there is a total absence of averment tending to show that the matters complained of altered the result of the election. The mere declaration in the pleading that contestee was not elected, and that contestor is entitled to the office, does not supply the foregoing omissions. The demurrer to the petition is sustained.

Demurrer sustained.

EMPIRE LAND & CANAL CO. v. ENGLEY ET AL.

1. **AUTHORITY AND DUTY OF DISTRICT JUDGES TO HOLD COURTS FOR EACH OTHER.**—The judges of the district court may hold courts for each other, and it is their duty so to do under certain circumstances.
2. **JUDGE'S AUTHORITY PRESUMED.**—When a district judge holds a term of court outside his own district, his authority so to do, and to try the causes pending in such court, will be presumed unless the contrary appears.
3. **BILL OF EXCEPTIONS TO BE AUTHENTICATED BY THE JUDGE WHO TRIES THE CAUSE.**—When one district judge tries a cause for another, the judge actually presiding is the proper one to authenticate the bill of exceptions as to any and all rulings excepted to before him on the trial.

Appeal from District Court of Rio Grande County.

Messrs. J. P. BROCKWAY and HOLBROOK & BROWN, for appellant.

Messrs. C. A. JOHNSON, D. V. BURNS and ADAIR WILSON, for appellees.

PER CURIAM. This is a motion to strike from the record of this cause the bill of exceptions, on the sole ground that the same is not signed and sealed by the proper judge. It appears that the cause was tried by Hon. John C. Bell, district judge of the seventh judicial district, while holding the district court of Rio Grande county, and that said county is in the sixth judicial district of which Hon. George T. Sumner is the district judge.

By the constitution of this state, article 6, section 12, it is provided that "judges of the district courts may hold courts for each other, and shall do so when required by law;" and the act of March 3, 1887, page 265, makes it their duty so to do under certain circumstances. In the absence of anything in the record to the contrary, we must presume that Judge Bell was legally holding the Rio Grande district court, and was duly authorized to try

this cause. Indeed his authority is in no manner questioned by this motion. Under the circumstances, therefore, he was the proper judicial officer to authenticate the bill of exceptions as to any and all rulings excepted to before him on the trial. The views expressed in the case of *Fechheimer v. Trounstiene*, 12 Colo. 282, are applicable to this motion; and the doctrine therein announced may now be regarded as definitely settled in this state. The motion to strike out the bill of exceptions is denied.

Motion denied.

14 290
J90 463

RILEY V. RILEY.

DECREE IN EQUITY — CONFLICTING EVIDENCE.— Where the evidence in the trial court is conflicting, but sufficient to sustain the findings and decree, the supreme court will not interfere.

Appeal from Superior Court of Denver.

MESSRS. G. W. MILLER and J. A. PERRY, for appellant.

MESSRS. MARKHAM & DILLON, E. A. CLARK and BARTELS & BLOOD, for appellee.

REED, C. This suit was brought by the appellee against his brother, the appellant, to recover one-half of \$2,400 received by him for grading done on the Denver & South Park Railroad. The contract for the grading was signed by appellant alone. Appellee claimed to be an equal partner, and entitled to one-half of the proceeds of the work. The only question that was to be determined was that of the alleged partnership. The case was heard before the court, the testimony being oral, and a decree entered finding that the partnership had existed, and that appellee was entitled to receive from the appellant \$1,200 and interest.

The only assignment of error relied upon in argument is the third, as follows: "The evidence is wholly insufficient to justify the findings and decree of the court."

The question tried and determined by the court, and brought here for review, was purely one of fact. The evidence was very conflicting and contradictory. There was sufficient evidence to warrant the finding and decree, but it cannot be said that there was any great preponderance of evidence in favor of the finding. Under such circumstances, the finding will not, according to the well-settled rule of this court, be disturbed. Counsel for appellant insists in argument that the court erred in allowing interest on the amount decreed. No good reason is shown why appellant should not have been chargeable with interest for withholding the money. The court may have found from the evidence that the money was unreasonably and vexatiously withheld, and that interest was properly chargeable under the statute.

The decree should be affirmed.

RICHMOND and PATTISON, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment of the court below is affirmed.

Affirmed.

FORD V. ROBERTS.

1. ESTOPPEL — EFFECT OF A DISMISSAL OF A SUIT BY STIPULATION.—

Where plaintiff moved a building for defendant, placing it in position on its new site, elevated on blocks furnished by the plaintiff, on which it was to rest ten days, in which time defendant was to have a permanent foundation placed under it and the blocks released, but failed to comply with his contract, and the plaintiff brought suit for the value of the blocks and for damages for their detention and use, the dismissal of such suit by stipulation of the parties, without a reservation to the plaintiff of the right to sue again, is a bar to another suit for the same cause of action.

2. **MEASURE OF DAMAGES.**—If at the expiration of the ten days defendant request the plaintiff to remove his blocks, and their removal be practicable, the plaintiff's damages on the account mentioned would be the expense of removal.
3. **SAME.**—But if the blocks are not capable of removal without compliance with his contract on part of defendant, the failure so to do amounts to a conversion, and the plaintiff's measure of damages is the value of the blocks at the date of the conversion.

Appeal from Arapahoe County Court.

Messrs. GEO. W. MILLER and JOHN A. PERRY, for appellant.

Messrs. BROWNE & PUTNAM, for appellee.

REED, C. It appears that the appellant, Ford, made a contract with Roberts, appellee, by which Roberts was to furnish the necessary tools and appliances, move a building, place it in position, furnish the necessary temporary blocking or underpinning, level the building, and allow the blocking to remain ten days, in which time Ford was to have a permanent foundation put in, so as to release the blocks of Roberts, and allow a removal of them. Such seem to be the facts, so far as ascertainable from the record.

The building was removed, and, as claimed by Roberts, leveled and blocked up, in accordance with the contract. Some controversy arose over the matter, and a suit was commenced by Roberts in the district court. Ford failed to have the foundation put in, and the blocking released, so he could remove it. A bill for \$60, the alleged value of the blocking at the time it was put in, in June, 1881, and a bill for \$150, for its detention, and the value of its use from the 14th of June to August 17th, was filed in the suit in the district court. The record in this suit does not say what, if any, adjudication was had; and shows that in March, 1883, suit was dismissed by stipulation at the cost of Ford, who paid the costs.

This suit was brought before a justice of the peace,

appeal taken to the county court, transcript filed September 13, 1883, tried by the court in January, 1886, and judgment for Roberts for \$100 and costs. The suit was brought for the detention and use of the blocking, and was the same as that for which the bill was filed in the district court. What was done in that court cannot be determined from anything in the record in this case, except a dismissal by agreement. The bill filed in that case became part of it; might have been adjudicated. If that case was settled by the parties without reserving a right to Roberts to again sue, that extinguished the cause of action. The court might have required proof, and, if the facts were found as above, the suit should have been dismissed at the cost of the plaintiff. If the supposed claim was not disposed of by the disposition of the suit in the district court, the case must be reversed for errors upon the trial.

It appears that Ford not only made no objection to Roberts' removing the blocks at the expiration of ten days, but told him to do so. Proof should have been made in regard to the practicability of the removal by Roberts, and; if practicable, he could have recovered only the expenses incident to taking the blocks out. If found impracticable, and that they could not be removed without Ford complied with his contract,—put in the foundation and released them,—the court should have treated it as a conversion by Ford at the expiration of the ten days, and the proper inquiry was as to the value of the blocks at the time of the conversion. This should have been fixed by competent testimony, and could not have exceeded the sum of \$60, as fixed by Roberts in his bill. Roberts was under no obligation to take the blocks back when they were released by Ford in September. He elected to do so, however, and did take them; and their value at the time of their recovery by Roberts should have been fixed, and the amount deducted from their value at the time of their conversion. There was

no contract of hire, and the measure of damage adopted by the court was erroneous, as may be seen at a glance. Roberts testified that he had replaced them at an expense of \$60. If Ford had not seen fit to release them, the time for which Roberts could have recovered for their use would have only been limited by the time they would resist natural decay; and Roberts, under the rule adopted by the court, and according to his evidence of the value of their use to him, could at intervals have recovered from \$750 to \$1,000 a year for the detention and use of material worth \$60.

The judgment should be reversed and cause remanded for further proceedings, in accordance with suggestions herein made.

RICHMOND and PATTISON, CC., concur.

PER CURIAM. For the reason stated in the foregoing opinion the judgment is reversed and the cause remanded.

Reversed.

14	294
14	308
14	294
15	593
14	294
18	66
18	356
1a	126
14	294
31	323

CRANE V. FARMER.

1. APPEALS IN FORCIBLE ENTRY AND DETAINER CASES.— Appeals to the supreme court in forcible entry and detainer cases are allowable only where the judgment appealed from amounts, exclusive of costs, to \$100, or relates to a franchise or freehold.
2. JOINING IN ERROR WILL NOT CONFER JURISDICTION.— Where the judgment sought to be appealed from is not appealable, consent by joining in error is ineffectual to save the appeal.

Appeal from Arapahoe County Court.

Messrs. ROSS & DEWEESE, for appellant.

Mr. F. A. WILLIAMS, for appellee.

MR. JUSTICE ELLIOTT delivered the opinion of the court.

Appellee moves to dismiss the appeal on the ground that the judgment sought to be reviewed is not appealable. The action was one of forcible entry and unlawful detainer, and it is conceded that the judgment rendered does not "amount, exclusive of costs, to the sum of \$100, or relate to a franchise or freehold."

It is clear that the judgment is not appealable, if the Code of Civil Procedure (section 388) is to control. But it is claimed that all actions of this kind are appealable under the act of 1885 relating to forcible entry and detainer. By section 22 of the latter act (p. 230, Sess. Laws 1885), it is provided:

"Appeals and writs of error to the supreme court from the judgment of the district, county or superior courts of this state, in proceedings under this act, shall be allowed as in other cases: provided, that in addition to the conditions now prescribed by law, the condition of the undertaking on appeal, and the time of filing the same, shall be required by this act [as] in cases of appeal from justices of the peace. And in cases of appeal from judgments founded upon causes of action, embraced in subdivision 4 of section 3 of this act, the deposit of rent money during pendency of appeal shall be made, or judgment of affirmance shall be entered, in the manner provided in section 18 of this act."

Upon careful consideration, we are of the opinion that it was not the intention of the general assembly to give greater opportunity for appeals to the supreme court in this class of cases than in other civil actions. We construe the act of 1885 as providing that appeals to the supreme court in forcible entry and detainer cases shall be allowed *as in other cases* only when the judgment appealed from amounts to \$100, exclusive of costs, or relates to a franchise or freehold; thus making the right of appeal in such cases subject to the *conditions prescribed by*

the Code of Civil Procedure, or other general law regulating appeals to this court, and other *additional conditions*, as provided in section 22 of the act.

In the case of *Eckles v. Booco*, 11 Colo. 522, it appears that the suit was commenced as an action of unlawful detainer. The defendant, by his answer, sought to raise an issue of a freehold title in a third person, but was unsuccessful. Upon the county court giving judgment for the restitution of the premises, without any money judgment in favor of the plaintiff, an appeal was taken and entertained by this court. But the question of the validity of the appeal was not raised in this court, and the judgment of the lower court was affirmed. So the case cannot be considered in any sense as a precedent against the views expressed in this opinion.

It is urged by counsel for appellant that appellee, having joined in error in this case, should now be held to have consented to the appeal. If this were a new question, we might be inclined to give it serious consideration; for we are aware that it has been determined differently in different jurisdictions. In the preparation of their briefs on this motion, counsel have been very diligent in searching for the decisions of other states upon this question, while entirely overlooking our own. This is a common fault, especially among the older attorneys of this bar, whose habits were formed while our reported decisions were exceedingly limited. But it should be borne in mind that Colorado now has twelve volumes of published reports, covering a variety of subjects; and counsel may save time and aid us materially by citing them whenever they are pertinent. There are numerous decisions of this court expressly declaring that, where the judgment sought to be appealed from is not appealable, consent by joining in error is ineffectual to save the appeal; that the defect is a jurisdictional one, and may be taken advantage of after, as well as before, joinder in error. *Peabody v. Thatcher*, 3 Colo. 275; *Thorne v. Or-*

nauer, 6 Colo. 39; *Hall v. Mining Co.* id. 81; *Vallette v. Smelting Co.* 11 Colo. 204.

This disposes of the motion adversely to appellant. The motion of appellee will be sustained, and the appeal dismissed.

Appeal dismissed.

MCCLURE ET AL. (SCHERRER, INTERVENOR) v. SMITH.
SAME v. CLOUGH.

14 297
11a 341
11a 342

1. CONVEYANCES — DEED ABSOLUTE TO OPERATE AS A MORTGAGE.— A deed absolute in form, intended to operate as a mortgage, if given in good faith to secure an actual indebtedness, is not constructively fraudulent as to the grantor's other creditors.
2. BONA FIDE LIEN VALID, THOUGH IN FORM FRAUDULENT.— This method of creating an incumbrance is a conspicuous badge of fraud as to existing creditors, but the *bona fides* of the transaction may be shown by collateral proofs.
3. CORRECTING OFFICER'S RETURN AS TO DESCRIPTION OF ATTACHED PROPERTY.— Amendments to the officer's return upon process to correspond with the fact, unless the party complaining has been deceived or misled to his prejudice, are liberally allowed. And when it appears that the notice of attachment upon realty, filed with the clerk and recorder, is correct, it is not error, on application supported by affidavits and notice to opposing counsel, to allow the sheriff to amend his return by correcting a misdescription of the realty attached.

Appeal from District Court of Arapahoe County.

SUITS were brought by Smith and Clough against Charles B. and H. C. McClure to recover claims for goods sold and delivered. Attachments were issued in these suits, and levied upon certain real estate in the city of Denver. This real estate appears of record in the name of Scherrer, and Scherrer duly filed a plea of intervention in each of the suits, claiming a superior right as against the attaching creditors. He averred in these pleas that, although the deed from the McClures to him-

self to the premises was absolute in form, yet it was intended, together with a certain defeasance in writing executed at the same time, to constitute a mortgage securing a large existing, and also a contingent, indebtedness.

The causes were consolidated and tried to the court upon the pleas of intervention, answers thereto, replications, and evidence offered. The court made specific findings of fact and of law, upon which was predicated a decree in favor of the attaching creditors and against the intervenor. To review this decree the present appeal was taken.

MESSRS. BENNETT & BENNETT, for appellants.

MESSRS. PERRY & CARPENTER, for appellees.

CHIEF JUSTICE HELM delivered the opinion of the court.

The present appeal was taken under the act of 1885. No evidence is embraced in the abstract, and therefore a review upon the evidence could not be had. The findings of fact, however, of the court below are properly before us, and, since they are not in any way questioned, will be accepted as conclusive.

By the record as presented, we are advised of the following facts: That McClure Bros., being indebted to Scherrer to a large amount, executed an absolute deed conveying the realty in question to him; that in connection with the giving of this deed, and as a part of the same transaction, Scherrer executed in writing, and delivered to McClure Bros., a defeasance; that the two instruments were designed by the parties to constitute a mortgage of the premises as security for the indebtedness to Scherrer; that the whole transaction, so far as Scherrer was concerned, was characterized by entire good faith in fact; that, immediately upon the execution of these instruments, Scherrer took and has since retained

possession of the mortgaged realty; but that, while the absolute deed to Scherrer was duly filed for record with the clerk and recorder prior to levy of the writs of attachment, McClure Bros. failed to record their defeasance.

Notwithstanding the foregoing conclusions of fact, however, the court found that as to Smith and Clough, the attaching creditors of McClure Bros., the transaction constituted a constructive fraud, and the deed to Scherrer was void in law. On this finding, the decree in favor of the attaching creditors was based, and upon its correctness or incorrectness the affirmance or reversal thereof must rest.

It is obvious that the court below adopted the view that a deed absolute in form, but in reality designed to operate as a mortgage only, is constructively fraudulent, and consequently void in law, as to other existing creditors of the mortgagor, even though the transaction contained no element of fraud in fact. This position of the trial judge is supported by well-considered decisions. *Friedley v. Hamilton*, 17 Serg. & R. 70; *Manufacturers', etc. Bank v. Bank of Pennsylvania*, 7 Watts & S. 335; *Smyth v. Carlisle*, 16 N. H. 464; *Bryant v. Young*, 21 Ala. 264; *North v. Belden*, 13 Conn. 376.

But in our judgment the weight of authority favors the view heretofore announced by this court. It was held in *Ross v. Duggan*, 5 Colo. 85, that, while this method of creating an incumbrance is a conspicuous badge of fraud as to existing creditors, it is not conclusive, and that the *bona fides* of the transaction may be shown by collateral proofs. It is true that when the mortgagee consents to take an absolute deed, even though, as in the case at bar, he delivers back a defeasance, he makes it possible for the mortgagor to deceive his other creditors. For this reason, such a proceeding is regarded with disfavor, and upheld with reluctance.

It would no doubt be wiser, as well as less harmful, if the mortgagee insisted upon having the transaction evidenced by an ordinary mortgage. But, if there be a *bona fide* debt for which the security is given; if there be no understanding with the mortgagee to hold the overplus, or to hold the property after payment of his debt, secretly, for the benefit of the mortgagor; if there be no collusion on the part of the mortgagee with the mortgagor in keeping the defeasance unrecorded, or in keeping secret the exact nature of the transaction, for the purpose of deceiving creditors; in short, if the mortgagee is simply endeavoring, in good faith, to obtain that precedence in the security of his debt which the law permits, the mere isolated fact that he takes an absolute deed, instead of a mortgage, will not, in and of itself alone, render his lien nugatory. The law prescribes no absolute and inflexible form for mortgages upon realty. It certainly assumes that such instruments as the one under consideration will sometimes be employed. Section 261, Civil Code 1887, provides that "the fact of a deed being a mortgage, in effect, may be proved by oral testimony." While this section would not be permitted to affect the title of a *bona fide* purchaser from the mortgagee, for good consideration, without notice, we conceive it to be broad enough to permit the proof mentioned as between the parties, and as against the claims of other creditors.

The view that fraud *per se* should not be imputed to such transactions as the one under consideration receives countenance from section 1529 of the General Statutes. This section declares that the question of fraudulent intent, in all cases relating to the conveyance or assignment of any estate or interest in lands, shall be a question of fact, and not of law. *Ross v. Duggan, supra*; Bump, Fraud. Conv. 40; *Gaffney's Assignee v. Signaigo*, 1 Dill. 158; *Harrison v. Trustees*, 12 Mass. 455; *Gibson v. Sey-*

mour, 4 Vt. 518; *Stevens v. Hinckley*, 43 Me. 440; *Chickering v. Hatch*, 3 Sum. 474; *Bank v. Jacobs*, 10 Mich. 349.

Since neither the case of *Ross v. Duggan*, in 5 Colo., nor the other cases *supra*, are mentioned by the briefs filed in this court, we are justified in assuming that the attention of the presiding judge was not directed thereto. Had he been advised of these authorities, especially of *Ross v. Duggan*, his decree would, doubtless, have been different.

In view of a retrial of the cause, we deem it important to notice briefly the remaining question argued on the present appeal. The return of the officer who levied the writ of attachment was slightly defective in its description of the realty attached. There is nothing, however, in the record before us to show that the attachment notice filed with the clerk and recorder partook of the same infirmity. The court, prior to the trial, upon application supported by affidavits, notice having been given to opposing counsel, and upon careful consideration, permitted the sheriff to amend his return by correcting therein the misdescription in question. This was not error. Amendments of the officer's return upon process to correspond with the fact are in the interest of justice; and, unless it be shown that the party complaining has been deceived or misled to his prejudice, great liberality in allowing them is always exercised. *Anderson v. Sloan*, 1 Colo. 33; *Loveland v. Sears*, id. 433; *Paper Co. v. Clark*, 3 Colo. 321; *Crock. Sher.* § 43; *Corby v. Burns*, 36 Mo. 194.

The judgment is reversed and the cause remanded for a new trial.

Reversed.

MR. JUSTICE ELLIOTT (who presided below). I concur in the foregoing opinion. The chief justice is quite right in supposing that the case of *Ross v. Duggan* was not cited *at nisi prius*. I did not have the opinion in that

case in mind at the trial, or I should gladly have followed it, instead of the Pennsylvania cases then referred to. This case serves to emphasize what was said in *Crane v. Farmer, ante*, p. 294, about the importance of giving attention to our own reports.

14 302/
17 86

ARMOR ET AL. V. SPALDING ET AL.

1. **DEEDS AND MORTGAGES—EXPRESS TRUSTS IN REALTY—STATUTE OF FRAUDS.**—In mortgages the defeasance ordinarily provides that upon payment of the debt title to the premises incumbered shall revert to the mortgagor.
2. To constitute a valid express trust in relation to realty, the conditions thereof must, by virtue of the statute of frauds, be in writing.
3. In this state an absolute deed may be shown by parol to be in effect a mortgage; but courts of equity can only give this construction to such a deed upon proofs clear, unequivocal and convincing.
4. An unacknowledged deed may be effectual in passing title to realty.
5. **EVIDENCE HELD INSUFFICIENT TO PROVE AN ABSOLUTE CONVEYANCE TO HAVE BEEN A MORTGAGE.**—In a suit to recover land conveyed by a deed absolute in form, on the ground that there was a parol agreement that it should operate as a mortgage, it appeared that the conveyance was in trust for the use of the Protestant Episcopal Church, with power to the trustee at will to convey the same for such price and upon such terms as to him may seem fit, "the proceeds of any such sale or conveyance to be held in trust for the same object and purpose above expressed;" that the grantor was indebted to the grantee in a greater amount than the value of the land at the time conveyed; that the debt was evidenced by notes and secured by deeds of trust on the land; that at the execution of the deed in question the notes were delivered to the grantor, but the trust-deeds remained unreleased; that the grantee, before the execution of the deed, wrote the grantors: "Of course, should I ever get out of the property more than the church dues, of which I am simply the trustee, it will be competent to consider your rights and dues in the matter." The attorney who drew the deed testified that he understood that it was agreed that the deed should be held to be a mortgage, but his partner and his clerk testified that the conveyance was intended as a final settlement of the indebtedness. *Held*, that the evidence was not sufficient to prove that the deed was a mortgage.

Error to District Court of Arapahoe County.

IN 1876, John F. Spalding, as bishop, was the owner of five promissory notes given by John Armor, aggregating \$8,380, besides interest at the rate of eighteen and twenty per cent. per annum. These notes were secured by trust-deeds upon the lots in dispute. Subsequently an absolute deed was given by Armor to Spalding, as bishop, covering the incumbered premises. Spalding at once took exclusive possession, and has since paid all taxes, insurance, and other expenses. The promissory notes held by Spalding were delivered to Armor, but at the commencement of this suit no cancellation of the trust-deeds, securing the same, appeared of record.

At the time the absolute deed was given, the property covered thereby was not worth, in the market, the full aggregate amount of the notes, together with interest. At the present time its value is estimated to be from \$75,000 to \$100,000. Plaintiffs in error, as the heirs of said Armor, brought suit in the court below to recover the premises in question, upon the theory that Spalding held them as mortgagee. Prior to the commencement of suit they offered to pay him the aggregate amount of indebtedness, together with interest to that time, and demanded the carrying out of the alleged mortgage agreement. Their tender and demand were refused.

The answer, after specifically denying the allegations of the complaint, in so far as that pleading alleged a trust or mortgage, averred an absolute sale. It also pleaded additional defenses, which, however, need not be stated.

A replication was filed, duly traversing the material new matter set up in the answer. The cause was tried to the court, and upon the evidence and pleadings a decree was rendered dismissing the complaint. To reverse that decree the present writ of error was sued out.

Messrs. WELLS, MCNEAL & TAYLOR and ENOS MILES,
for plaintiffs in error.

Messrs. S. C. HINSDALE and J. L. JEROME, for defend-
ants in error.

CHIEF JUSTICE HELM delivered the opinion of the court

The complaint in the case at bar avers that the absolute deed given by John Armor to Spalding, as bishop, coupled with the alleged parol agreement existing at the time of its execution, constituted a mortgage. But in pleading the conditions of the defeasance it declares that Spalding was not only to take possession of the property under the deed, "hold the same in trust, collect all rents and profits, pay all taxes and expenses," but also that "when it so enhanced in value that it could be sold so as to leave Armor a surplus, Spalding should sell, satisfy his indebtedness, and pay the overplus to Armor, his heirs or assigns, on a reasonable request." There was no provision that the title should in any event be restored to Armor. It was conveyed to Spalding with authority to sell. This fact is somewhat inconsistent with the theory of a mortgage; for in mortgages the defeasance ordinarily provides that upon payment of the debt title to the premises incumbered shall revert to the mortgagor. *Lance's Appeal*, 112 Pa. St. 456; *Hoffman v. Mackall*, 64 Am. Dec. 637; *Reece v. Allen*, 48 Am. Dec. 336.

The averments under consideration are more analogous to the conditions of an express trust. Thus regarding the transaction, however, it is obvious that the action must fail. The conditions of the alleged trust not being written, its enforcement is inhibited by the statute of frauds. No bad faith is averred on the part of Spalding in procuring the conveyance, and this case is not covered by an exception to the foregoing statutory requirement.

But counsel for plaintiffs rely, in argument, entirely upon the view that the transaction constituted a mort-

gage, and that plaintiffs, as the heirs of Armor, since deceased, may assert a right to the reconveyance of the property upon payment of the mortgage debt, with interest. If their major premise be correct, their conclusion correctly follows, unless the remedy is barred by limitation, or for some other reason cannot be enforced. The equitable rule that an absolute deed may be shown by parol to be in effect a mortgage has, in this state, received express legislative recognition. Civil Code, § 261. We shall assume that the mortgage issue is sufficiently presented by the pleadings, and proceed to consider whether the evidence sustains plaintiffs' theory.

It should be observed at the outset that only upon clear, unequivocal and convincing proofs will courts of equity construe an absolute deed to be in effect a mortgage. *Whitsett v. Kershow*, 4 Colo. 419; *Lance's Appeal*, *supra*; *Gassert v. Bogk*, 7 Mont. 585; Jones, *Mortg.* (4th ed.) § 335, and cases cited. Plaintiffs have engaged in a difficult undertaking. They are to show a parol defeasance agreement made over twelve years prior to the commencement of suit, with an ancestor, who died soon after making the same; and upon them rests the burden of establishing this agreement so clearly that the mind of the chancellor shall be free from substantial doubt.

To maintain the foregoing issue, and discharge the resulting burden, plaintiffs rely upon the following proofs:

First. A letter written October 9, 1875, by Spalding to John Armor. Armor was hard pressed for money, and, as the closing paragraph of the letter sympathizingly declares, in "perplexity and distress." He was seeking relief, not through the giving of an absolute deed to Spalding, but by urging the latter to release some part of the premises covered by the five trust-deeds, then securing as many notes of Armor given or assigned to Spalding, as bishop. The letter in question was written in response to this urgent appeal. Spalding therein speaks of having consulted with Mr. Kountze and other

friends regarding the matter, and declines to grant the request. It is true he says incidentally: "Of course, should I ever get out of the property more than the church dues, of which I am simply the trustee, it will be competent to consider your rights and dues in the matter; but I fear that we shall have to wait for some years, and the interest of the money will more than cover any enhancement in value." But while the letter speaks of "closing up the matter," and refers Armor to Sayre for that purpose, no terms of settlement are specified. This letter was written over fourteen months prior to the execution of the absolute deed. It is not in any way connected therewith by extrinsic evidence, and there is nothing to show that it was mentioned or thought of when the deed was given. But, even if coupled with the transaction, it affords little aid to plaintiffs' case. The declaration that in the unexpected contingency of a sale and surplus *it would be competent* to consider Armor's rights and dues in the matter is not an agreement to pay over the surplus, nor does it indicate the existence of such an agreement. It shows, at most, a disposition on the part of Spalding to favor Armor within legal and reasonable bounds.

Second. A conversation between two of the plaintiffs and Spalding in 1888, after demand had been made for a reconveyance of the property. In this conversation, it is claimed that when asked whether a parol agreement was not made with the elder Armor at the time the deed was given, providing for an ultimate sale and repayment to him or his heirs of the overplus after liquidation of the indebtedness, Spalding hesitated and then answered: "Well, the moneys that your father used belonged to eastern trusts, and whatever I might have said would not have made any difference." Spalding, in his testimony, declares that there was not the slightest hesitation in answering. He does not squarely deny having used the foregoing or similar language, but asserts that

he at once positively and persistently insisted that the transaction was an absolute sale. So the alleged hesitancy and equivocation are evidenced only by the testimony of two deeply interested witnesses, while their existence is disputed by defendant, who acted throughout the entire proceedings solely as a trustee for others. Besides, in his letter inviting this very interview, Spalding expressly declares that he was compelled, much against his will, to take the property for the debts; also, that Armor begged him not to foreclose, "for in that event he [Armor] might have been held for a large amount over and above the proceeds of sale, and judgment obtained against him." This letter was offered in evidence by plaintiffs, and fairly corroborates Spalding's declarations on the witness stand. If, at the interview, as in the letter, he maintained that the deed represented an absolute sale, a plausible explanation of the statement imputed to him would be that like his other suggestion in the letter, that a suit could only be settled in the supreme court of the United States, it was legal advice volunteered upon the doubtful hypothesis that even if he *had* made oral concessions the real parties in interest would not be bound thereby.

Third. The part we have, for convenience, italicised, of the following extract from the absolute deed under consideration: "In trust, however, for the use of the said Protestant Episcopal Church, with power to the said party of the second part, or his successor in office, at will, to convey the same, either with or without warranty, for such sum and price, and upon such terms and conditions, as to him, or any of his successors in office, shall seem fit; the proceeds of any such sale or conveyance to be held in trust for the same object and purpose above expressed." The purpose of expressly providing that Spalding might sell the premises conveyed is explained by the extract itself. It is evident from the language employed that the provision had reference to the position

of Spalding, as trustee of church property. He took title in his trust capacity, and caused the deed to be so drawn that no embarrassment would follow in reselling and re-investing the proceeds. That, in any event, Armor was not to be the beneficiary, clearly appears by the concluding clause of the quotation, which provides that the proceeds are to be held in trust for the "purpose above expressed," *i. e.*, for the use of the Protestant Episcopal Church.

Fourth. *A certain indorsement upon one of the promissory notes.* It appears that an item of \$38.05 interest was credited upon one of the Armor notes by Spalding on December 23, 1876. It will be remembered that the deed in question bears date December 13, 1876, and plaintiffs argue that this credit indicates that Armor's interest in the property did not terminate with the giving of the instrument. The complaint avers, and the answer does not deny, that the conveyance was executed and delivered on December 13th. Moreover, it is true that unacknowledged instruments of the kind may nevertheless be effectual in passing title. But counsel for defendant insist that especially since this is a suit in equity, the following circumstance may be considered: The deed itself, which was *received in evidence without objection or limitation*, shows that it was not *acknowledged or filed for record* until upwards of three weeks after its date, and more than two weeks after the credit mentioned was given. Counsel urge that from this circumstance the inference may be fairly drawn that the transaction represented by the deed was not finally closed till January 12th, the date of acknowledgment and recording. The matter is not of sufficient importance to warrant a discussion of the question of practice involved, and we shall leave it with the single remark, that if counsel's view be correct, the supposed discrepancy arising from the indorsement of interest entirely disappears.

Fifth. *That the trust-deeds originally given to secure*

the notes have never been released upon the county records. Spalding, as bishop, was the real owner of these instruments, and Armor's deed in fact merged in him the entire ownership of the property. Though the notes were canceled, it was imprudent, perhaps, to permit this seeming cloud to remain of record. But until an attempt to convey, the importance of a formal release might not occur to any but a legal mind. The circumstance in question, therefore, possesses no great significance.

Sixth and last. The testimony of Alfred Sayre. Mr. Sayre acted as the attorney, advising with Armor and Spalding concerning their matters. He gives his recollection of the conversations that took place in his office between the parties about the time of the execution of the instrument. He does not undertake to relate these conversations; but, after giving the substance, which strongly corroborates plaintiffs' theory, he concludes with the declaration that he "had no moral doubt that an equity of redemption or right to the surplus rested in Armor." This is the most cogent evidence produced by plaintiffs; but in considering it we should remember that Mr. Sayre was an attorney in active practice, carrying in his mind a multitude of transactions; that upwards of thirteen years have elapsed since the occurrence, and during that time his attention has never before been directed to the matter; that he now admits his inability to recall specifically the conversations; and that his impressions, which constitute part of his testimony, are not competent. But Mr. Sayre's recollection and impressions on the subject are different from those of Messrs. Wright and Jerome. The former was Mr. Sayre's law partner; the latter was then a clerk in the office. Both were present when the deed was made; both heard conversations between Spalding and Armor in connection therewith. Their recollections and impressions of these conversations are to the effect that the deed was delivered

and accepted in final settlement of the notes, and as a full discharge of the indebtedness represented thereby.

Fairly weighing the foregoing proofs alone, in the light of surrounding circumstances, the burden assumed by plaintiffs is not discharged. It cannot be said that the existence of a mortgage is so established as to relieve the mind of a chancellor from substantial doubt. But the testimony of Spalding is strongly corroborated by the following circumstances, as yet unconsidered.

The promissory notes were evidently delivered back to Armor when the deed was executed. Plaintiffs themselves produced these notes at the trial. There is nothing in the record showing or tending to show that new ones were given. Had the transaction been in reality a mortgage, Spalding would, in all probability, either have kept the original notes or have insisted upon the execution in lieu thereof of a new instrument, conditioned according to the terms of the defeasance, and specifying the rate of interest.

The defeasance condition of the alleged mortgage is highly unreasonable. Spalding is required thereby to hold the mortgaged property until such time as its enhancement in value will enable him to sell it and leave a surplus for the mortgagor. He cannot sell, apply the proceeds to the discharge *pro tanto* of the indebtedness, and forgive the balance thereof; he cannot even make the sale when there has been sufficient increase of value to wholly liquidate his debt with interest; he must wait until such time as its enhancement will leave a surplus for Armor; how much of a surplus does not appear, the amount thereof being wholly unmentioned. No date is fixed for the payment or even maturity of the principal debt, though, when the deed was given, the original notes were all past due. There was no certainty that the property would ever so enhance in value as to pay the debt, with accumulating interest, to say nothing of a

surplus. According to the complaint, as a matter of fact, there could have been no surplus until more than ten years had expired. The alleged arrangement is devoid of business characteristics. It is such an arrangement as no man of ordinary prudence would be likely to make in conducting his personal affairs. It is such an arrangement as the law would be extremely loath to sanction when made by a trustee in the management of a trust-estate.

In view of the foregoing conclusion, it is unnecessary for us to consider the defenses based upon statutes of limitation. We shall not further prolong this opinion by discussion thereof.

The judgment of the district court is affirmed.

Affirmed.

CORRIGAN, EX'R, ET AL. V. JONES, ADM'R, ETC.

1. **WILLS—THE FIRST PLACE OF PROBATE IS THE TESTATOR'S LAST DOMICILE—PRESUMPTION CONCERNING—HOW THE PROBATE AND RECORD MAY BE QUESTIONED.**—A will should be first admitted to probate in the jurisdiction of the testator's last domicile; but in admitting a will to probate the court must be presumed *prima facie* to base its adjudication respecting the last domicile upon sufficient evidence, and, under such circumstances, the probate and record thereof can only be questioned by some appellate or direct proceeding.
2. **LETTERS TESTAMENTARY OR OF ADMINISTRATION HAVE NO EXTRATERRITORIAL FORCE.**—The general rule is that letters testamentary or of administration have no extraterritorial force. When such letters have been duly granted in the jurisdiction of deceased's last domicile, they are the principal letters of authority, and those granted in other jurisdictions are ancillary.
3. **HOW A WILL MAY BE PROBATED WHICH WAS FIRST ADMITTED TO PROBATE IN A FOREIGN STATE—LETTERS TESTAMENTARY MAY ISSUE THEREON.**—A will admitted to probate in the court of another state having jurisdiction of such matters is, on the presentation of the duly certified record thereof, entitled to be admitted to probate and record in this state, and letters testamentary or of ad-

ministration may issue thereon as in other cases. The probate and record, under such circumstances, would seem to be mandatory; but the court is invested with discretion in the matter of issuing letters, but the discretion is not arbitrary. It must be sound and reasonable,—such as will secure the administration of the estate according to the will of the deceased, as well as with due regard to local creditors.

Error to Bent County Court.

MESSRS. STALLCUP & SHAFROTH and STEELE & MALONE,
for plaintiffs in error.

MR. GEORGE Q. RICHMOND, for defendant in error.

MR. JUSTICE ELLIOTT delivered the opinion of the court.

In October, 1884, the last will and testament of Owen Doherty, deceased, was admitted to probate and record in the probate court of Jackson county, state of Missouri, and thereupon letters testamentary were issued by said court to Bernard Corrigan, who was appointed executor in and by said will. The executor, Corrigan, is one of the plaintiffs in error in this proceeding. The property of the testator, as described in the will, consisted of "cattle and cattle ranches in Bent and Las Animas counties, in the state of Colorado,"

Corrigan having procured a transcript of the record of the Jackson county probate court in the matter of the probate of said will, duly certified in the manner required by the act of congress in such cases, presented the same to the Bent county court, and asked that said will be admitted to probate and record in that court as provided by the statute of this state in such cases. The judge of the Bent county court thereupon issued a citation to the defendant in error, James C. Jones, who had theretofore been appointed administrator of said Owen Doherty by said Bent county court, notifying said Jones to appear and show cause, if any he had, why said will should not be admitted to probate in said Bent county

court, and letters testamentary be granted to said Corrigan, and the letters of administration heretofore granted to said Jones be revoked.

Jones appeared, and by his attorney protested against the probate of said will, and against the granting of letters testamentary to said Corrigan. The grounds of protest may be considered under two principal heads: *First*, that the probate of the will by the Missouri court was invalid, inasmuch as the domicile of Doherty at the time of his death was in Bent county, Colo., and not in Jackson county, Mo.; *second*, that letters testamentary could not lawfully issue to said Corrigan, he being a non-resident of the state of Colorado.

Corrigan, by his attorney, filed a written brief and argument in response to the protest of Jones. The court, having considered the argument of counsel, without taking any evidence as appears by the record, rendered judgment refusing to admit said will to probate, and refusing to grant letters testamentary to said Corrigan until the will of said Doherty should be proved to the court in a satisfactory manner. To reverse this adjudication the case is brought to this court by writ of error.

Plaintiffs in error rely upon section 27 of the statute of wills (ch. 115, Gen. St. Colo.) in support of their claim to have the will of Doherty admitted to probate in this state upon the certified record of its probate in the Missouri court.

In support of his protest on the ground of domicile, appellee relies upon the recital at the beginning of the will, as follows: "I, Owen Doherty, of the county of Bent, in the state of Colorado, temporarily residing in Kansas City, Missouri."

The will bears date February 7, 1884. It was offered for probate in the Missouri court on July 8th of the same year. The precise date of Doherty's death does not appear, but it may have been five months after the execu-

tion of the will; so that, whatever weight the recital in the will may have as evidence of the testator's domicile at the time of its execution, it is not conclusive of that question, and is but a circumstance indicating his domicile at the time of his decease. Besides, the record of the probate of the will declares the same to be "the last will and testament of Owen Doherty, deceased, late of Jackson county."

In admitting the will to probate the Missouri court must be presumed *prima facie* to have based its adjudication respecting the domicile of Doherty at the time of his decease upon sufficient evidence. Under such circumstances, the probate of the will, and the record thereof, can only be questioned by some appellate or direct proceeding. Const. Mo. art. 6, § 34; 1 Rev. St. Mo. 1879, §§ 1176, 3974; Wells, Juris. § 274; 2 Greenl. Ev. § 672; *Woodruff v. Schultz*, 49 Iowa, 430; *Bostwick v. Skinner*, 80 Ill. 147; *Monell v. Dennison*, 17 How. Pr. 422; *Irwin v. Scriber*, 18 Cal. 500; *Thompson v. Tolmie*, 2 Pet. 157; *Inhabitants of Ward v. Oxford*, 8 Pick. 476.

The will, having been duly admitted to probate in Missouri, should, on the presentation of the duly-certified record thereof, have been admitted to probate and record in this state, and letters testamentary should have issued thereon to the executor named in the will, or letters of administration with the will annexed should have been granted thereon as in other cases, according to the provisions of General Statutes of Colorado, chapter 115. Our statutes in this respect are based upon principles of comity. The general rule is that letters testamentary or of administration have no extraterritorial force. When such letters have been duly granted in the jurisdiction where the deceased had his last domicile, they are regarded as the principal letters of authority, and those which may be required in other jurisdictions, where property of the deceased requiring administration may be located, are

considered as ancillary merely. Schouler, Ex'rs, ch. 7; *Shephard v. Rhodes*, 60 Ill. 301; *Davis v. Estey*, 8 Pick. 475; 1 Redf. Wills, 397.

In support of his second ground of protest, appellee cites section 36, chapter 22, of our General Statutes, which provides, in substance, that any executor or administrator *appointed in this state* who shall remove without the limits of the state shall, *under certain circumstances*, be removed from his office as such executor or administrator. This section falls short, however, of sustaining the position of appellee that a non-resident executor, deriving his authority *under a will*, may not receive in this state letters testamentary, ancillary to those granted to him upon an authorized probate of the will in the state of the testator's last domicile.

The case of *Child v. Gratiot*, 41 Ill. 357, is also cited by appellee as sustaining the doctrine that a non-resident cannot, under any circumstances, be permitted to exercise the office of executor or administrator in this state. The opinion in that case is based upon a statute somewhat different from ours. Laws Ill. 1847, p. 63; 1 Starr & C. Ann. St. ch. 3, par. 31.

Besides, the facts of that case are not analogous to those under consideration. That was a case of a non-resident administrator. The statute of Illinois above cited, as construed in *Child v. Gratiot*, makes removal from the state a cause for the removal of any executor or administrator from his office. Section 21, Revised Statutes of Colorado, 1868, page 525, was similar to the Illinois statute; but, as amended (sec. 24, Gen. Laws 1877, p. 260), removal from the state is a ground of removal from office only when the executor or administrator is "appointed in this state." In the case of executors the change is significant. Executors, though receiving their letters from the court, derive their appointment as well as their authority primarily from the will itself, while

administrators derive their authority and appointment directly from the court.

A non-resident executor deriving his authority and appointment from a will executed abroad, and admitted to probate in the jurisdiction of the testator's last domicile, may come to this state, and, upon presenting a record of the probate of such will, duly certified, is entitled to have the same admitted to probate and record in this state, and thereupon letters testamentary or of administration *may issue* thereon as in other cases. Gen. St. 1883, ch. 115, § 27. The probate and record of the will, under such circumstances, would seem to be mandatory; but the court is doubtless invested with some discretion in the matter of the issuance of letters testamentary or of administration. But the discretion is not an arbitrary one. It must be sound and reasonable,—such as will secure the administration of the estate according to the will of the deceased, as well as with due regard to local creditors. Such would seem to be the proper construction of our statutes of wills and administration, and such is the doctrine of the standard authorities heretofore cited upon the subject.

Our conclusion is that it was error to refuse to admit the will of Doherty to probate and record in this state; and that, the will being probated, letters testamentary should issue thereon to the executor named therein, unless it be made to appear to the court that such executor is in some manner disqualified, or incapable of administering upon the estate of the non-resident in this jurisdiction, with due regard to the rights, interests and convenience of local creditors; in which case letters of administration with the will annexed should be granted, as provided by section 31 of the statute.

The judgment of the county court is reversed, and the cause remanded for further proceedings in accordance with this opinion.

Reversed.

STOCKING V. MOREY.

TRIAL BY COURT — MOTION FOR NEW TRIAL — BILL OF EXCEPTIONS.—

Where a trial is had to the court, and its findings announced, an undetermined motion for a new trial operates to reserve the case, and continue the jurisdiction beyond the term for the purpose of disposing of the motion and settling a bill of exceptions.

14	317
16	337
14	317
18a	211
18a	425

Appeal from District Court of Arapahoe County.

MOTION to strike out part of bill of exceptions.

This case was tried at the April, 1889, term of said court, on the 26th day of April, 1889, and taken under advisement, and on May 3, 1889, the court found for the plaintiff. May 8, 1889, at the same term, defendant filed his motion for a new trial.

No bill of exceptions was filed at the April term, 1889, of said court, nor was any order entered at that time fixing the time for filing bill of exceptions. At the September term, 1889, of said court, and on the 12th day of October, 1889, the same judge presiding, the motion for a new trial was denied, and judgment was entered in favor of plaintiff and against defendant. And on the same day defendant was allowed an appeal to the supreme court, and thirty days given for an appeal bond, and also the following order entered: "And time, and until thirty days from this date, is allowed said defendant in which to prepare and tender to the judge of this court his bill of the exceptions by him reserved herein, which, when signed and sealed by the said judge, shall be filed herein as of this date."

November 7, 1889, the time for bond and bill of exceptions under the foregoing order was extended, the court allowing defendant fifteen days' additional time. The bill of exceptions herein was tendered to the judge November 26, 1889, and on that day signed and sealed by him. This bill of exceptions contains not only the exception reserved to the ruling of the court in over-

ruling the motion for a new trial, and the exception to the judgment, which said exceptions were taken at the September term, but also all proceedings occurring upon the trial of said cause at the preceding April term.

Messrs. TROWBRIDGE & HINCKLEY, for appellant.

Messrs. TELLER & ORAHOD, for appellee.

MR. JUSTICE HAYT delivered the opinion of the court.

We are asked upon this motion to strike from the bill of exceptions filed herein all that portion relating to the proceedings had in the court below at the April term thereof, or, in case the court should be of the opinion that this ought not to be done, then appellee seeks to have all the proceedings had at such term stricken out, save and except only the evidence.

The position of appellee is substantially this: That to make the proceedings had at the April term a part of the record, appellant should either have tendered a bill of exceptions containing the same to the judge for his authentication during that term, or procured an order from the court at that term, giving additional time in which to present the same. In support of this position, our attention is called to section 385 of the Civil Code, in which it is provided that where either party excepts to any ruling, decision or opinion of the court, and shall reduce such exception or exceptions to writing, it shall be the duty of the judge to allow, sign and seal the same at any time during the term of court at which such exceptions are taken, or at any time thereafter to be fixed by the court.

Had the motion for a new trial been determined and a final judgment pronounced at the April term, and had the court at the following term made the order in reference to the bill of exceptions, appellee's objections would have been well taken, but such are not the facts. No

ruling upon the motion for a new trial was made until the subsequent term, and final judgment was reserved by the court until after such ruling should be made. Under the circumstances, we can see no good reason for holding that the bill of exceptions presented within the time allowed by the court for the same, at the September term, was not presented in apt time to preserve the entire record, while cogent reasons exist for the opposite conclusion.

Had the motion for a new trial been sustained appellant would have had no occasion for this bill of exceptions; and to say that he must put his client to the expense and himself to the labor of preparing a bill that might never be used, would, in our judgment, accomplish no good purpose. And to require him, pending a decision upon such motion, to petition the court for an order extending the time in which to present such bill, would be unreasonable. In *Gomer v. Chaffee*, 5 Colo. 383, the provision of our code requiring that the motion for a new trial and the decision thereon shall be made and had at the same term the findings were made or the verdict rendered, has been declared by this court to be directory merely, so far as the action of the court is required to be performed within a specified time. This decision recognizes the power of the court to continue the motion to a subsequent term for determination. The court may be delayed in announcing its ruling upon the motion for a new trial one month or six months; and to require a litigant to anticipate, in his application for time within which to prepare and present a bill of exceptions, the date upon which the court will finally pass upon such motion, would be unwise. Neither do we believe that the framers of our code ever intended, when a cause is tried at one term and a motion for a new trial is made and then continued until the next term, that a bill of exceptions should be filed preserving a record of the trial, and a subsequent bill to preserve the proceed-

ings upon the motion for a new trial. *Henze v. Railroad Co.* 71 Mo. 636.

The case of *Railway Co. v. Twombly*, 2 Colo. 559, cited in support of the motion to strike, was decided prior to the adoption of the code; and without questioning the correctness of the decision in that case, under the practice as it then existed, we are of the opinion that the conclusion reached in the case of *Gomer v. Chaffe*, *supra*, is more in harmony with the liberal construction enjoined by the code. Formerly it was quite important to have the bill of exceptions presented promptly upon the happening of the matters excepted to, in order that the trial judge might determine the correctness thereof while the facts were yet fresh in the mind of the court; but with the introduction to the court-room of official stenographers, who are required to take down in full all such matters as may properly be made a part of the record in this manner, the principal reason for the strict construction given statutes like this one under consideration, when such means of preserving a record of the proceedings was unknown, no longer exists.

The facts in the case last cited were quite similar to those presented in the case at bar, and the opinion is authority for saying that where a trial is had to the court, and its findings announced, an undetermined motion for a new trial operated to reserve the case and continue the jurisdiction beyond the term, for the purpose of disposing of the motion and the settling of the bill of exceptions.

We are of opinion that the proceedings had upon the trial at the April term of the district court are properly made a part of the record by the bill of exceptions presented within the time fixed by the court at the time of overruling the motion for a new trial and entering final judgment in the cause, although this was at a subsequent term.

The motion to strike out is overruled.

Motion denied.

KEITH ET AL. V. WELLS.

1. PRACTICE IN ATTACHMENT OF CHATTELS—EXAMINATION OF WITNESSES BY TRIAL JUDGE AS TO COMPETENCY.—In an action for the alleged wrongful attachment of a stock of goods, where there is a wide difference of opinion among witnesses as to its value, it is not improper for the trial judge to subject the witnesses to a searching examination as to their competency, to enable the jury to judge of the value of their testimony.
2. EVIDENCE—READING TO THE JURY ENTRIES IN BANK DEPOSIT BOOKS.—Where bank deposit books have been admitted in evidence without objection, their contents are before the jury for consideration; and it is not prejudicial error for the trial court to permit the bank teller to read their contents to the jury, though he has no personal knowledge as to part of the entries.
3. ORAL CHARGE TO JURY BY CONSENT, AND INSUFFICIENT EXCEPTIONS THERETO.—Where, by consent, the charge to the jury is given orally, an exception to the "giving of said charge, and each several proposition of law therein contained," without calling the judge's attention to any particular error, is insufficient to bring up for review alleged erroneous portions of the charge.
4. PRACTICE IN SUPREME COURT—NO MOTION BELOW FOR NEW TRIAL, AND IMPERFECT BILL OF EXCEPTIONS.—Where only part of the evidence given at the trial is preserved in the bill of exceptions, and a new trial was not asked for in the court below, the supreme court can review only errors of law occurring at the trial to which exceptions were duly reserved.

Appeal from District Court of Arapahoe County.

IN the early part of the year 1882 the plaintiffs, Osborne R. Keith and Alexander B. Adams, as copartners, etc., commenced suit against Margaret S. Withers, defendant, for the sum of \$1,158.52 and costs of suit. The plaintiffs caused an attachment to be issued in said suit, and levied upon a certain stock of millinery as the property of the defendant. The conceded facts show that the defendant, for several years prior to the commencement of the action, was the owner and proprietor of a certain millinery business in the city of Denver. While the business was being so conducted, and upon the 21st day of March, 1882, Miss Withers went to Chicago to re-

14	321
14	544
14	321
15	308
16	97
16	531
14	321
18	194
18	405
14	321
23	98
23	330
14	321
10a	144
14	321
126	263
13a	214
14	321
27	488
14	321
17a	183
14	321
19a	411

plenish her stock. While there she purchased from the plaintiffs, O. R. Keith & Co., upon credit, the bill of goods for which she was sued in this action. Afterwards she made a confession of judgment in favor of Mrs. Wells for moneys claimed to have been advanced Miss Withers from time to time to assist her in the business; upon which confession judgment was immediately entered in the district court of Arapahoe county, and an execution issued. Upon this execution the stock was sold at public auction by the sheriff, Mrs. Wells being the purchaser. After the sale, Mrs. Wells took charge of the business, and continued it in her own name, replenishing the stock from time to time, for a period of about one year, at which time the plaintiffs, assuming that such confession of judgment was fraudulent as to the creditors of Miss Withers, caused the entire stock to be attached, and again sold as her property. In this suit a petition of intervention was afterwards filed by Mrs. Wells, in which she claimed to be the owner of the attached property, and sought to recover its value. Upon the issues raised upon this intervention the case was thereafter tried, the trial resulting in a verdict and judgment for the intervenor for the sum of \$4,402.81, from which judgment the plaintiffs, Keith & Co., took this appeal.

Messrs. STUART BROS. & ANDREWS, for appellants.

Messrs. TILFORD & GILMORE, AMOS STECK and M. B. CARPENTER, for appellee.

MR. JUSTICE HAYT delivered the opinion of the court.

It is conceded that only a part of the evidence introduced upon the trial is preserved in the bill of exceptions. Of the amount and character of the evidence omitted we are not advised. For this reason alone, according to well-settled rules of practice, this court is precluded from

considering the evidence for the purpose of determining its sufficiency to support the verdict. An examination of the record discloses, also, that a new trial was not asked in the court below. Under these circumstances our review cannot be extended further than an examination of such errors of law as it is claimed intervened at the trial, and to which exceptions were duly reserved at the time; and very few exceptions of any kind appear in the record.

The first assignment of error is in relation to the testimony of Charles R. Pierce, a witness introduced by the intervenor. This witness testified that he was a teller of the Safe Deposit Bank, and identified certain books as the deposit books of Miss Withers in that bank, the entries in which were made by whoever happened to be at the counter at the time. At this point the books were introduced in evidence without objection. Afterwards the witness was permitted, against plaintiffs' objection, to read the contents of these books, although the witness had no personal knowledge in reference to a part of the entries, such entries having been made by others. As the books had been previously admitted in evidence without objection, their contents were before the jury for their consideration. Therefore appellants could not have been injured by the oral evidence of Pierce, and, consequently, are not in a position to complain of the action of the court in admitting the testimony of the witness against their objection.

The next error assigned is upon the testimony given in reference to the value of the property. The testimony upon this point shows that some difference of opinion existed between the several witnesses in reference to such value. Mr. Howland, a witness for the plaintiff, placed the value at about \$2,500, while the other witnesses estimated the value at double that amount. Mrs. Wells, a witness in her own behalf, testified that in her judgment the property was at that time worth more than \$6,000.

Appellants claim that this witness included the fixtures in her estimate, and that it was error to permit the testimony to go to the jury against plaintiffs' objection, as her competency to judge of the value of such fixtures is not shown. We think the full examination of this witness shows that her estimate was based solely upon the value of the millinery stock, without the fixtures. Aside from this, the objection now urged to her testimony was not made in the court below.

In connection with the evidence of Mrs. Wells, counsel for appellants call attention to the fact that the witness Howland was subjected to a searching examination in reference to his competency, by the presiding judge, before he was permitted to give an opinion as to the value of the property; the claim advanced being that the court exceeded reasonable bounds in conducting this examination, and that the questions propounded were of a character well calculated to prejudice the minds of the jury against the witness, and did actually destroy the effect of his answers. As we have seen, there was a wide difference of opinion among the witnesses in reference to the value of the property, and, under the circumstances, it is fair to presume that the court was of the opinion that the jury were entitled to the fullest information in reference to the competency of the witnesses testifying as to the value; and, as the questions propounded to the witness by the court were calculated to elicit information in reference to the knowledge of Howland on this subject, we are of the opinion that the error assigned is not well taken.

The third objection is to the cross-examination of Keegan, and to the testimony of Norris and that of Mrs. Wells, concerning a difficulty that she had had with Keegan. To all of this testimony there were but one or two objections made, and these were of the most general character. No exceptions were reserved, and it in no way appears that the objections now argued were called to the

attention of the trial court, and for this reason alone they ought not to be considered here.

We are also prevented from considering the errors assigned upon the charge of the court to the jury on account of the failure of counsel to call attention of the trial judge to the points which are claimed to be erroneous. By the express consent of counsel, the charge to the jury was given orally. In the printed abstract this charge occupies seven pages. At the close of the charge the court invited suggestions from counsel as to any exceptions which they might wish to make to the same, as is shown from the following colloquy taken from the record:

"Mr. Baxter (for plaintiff). We except to the charge, or portions of the charge. The Court. If there are any exceptions, I will hear any suggestions.

"Judge Steck (for intervenor). We note an exception, if your honor please, to the charge.

"Mr. Baxter. Note our exception also."

It is true in the bill of exceptions it is stated, generally, "that to the giving of said charge, and each several proposition of law therein contained, the plaintiffs at the time excepted. This language probably refers to the previous colloquy, and, perhaps, should be held to be limited by the more particular recitals of the same. Be this as it may, under the decisions, appellants are in no better position to have the charge reviewed in this court by reason of the subsequent recital.

In *Railway Co. v. Ward*, 4 Colo. 33, it is said: "When instructions given by the court are in the nature of a *general charge*, excepting to each and every of the instructions will not avail."

This rule is in entire accord with the decisions. Where the charge is given orally, as in this case, the judge will often fall into errors which would be corrected if his attention was called to them at the time, and counsel, being listeners, are more apt to notice such errors than

the judge himself, and, failing to call his attention thereto, they will be considered as waived. Hayne, New Trial & App. § 128. The exceptions, taken singly or together, did not call the attention of the court to any particular error in law of which counsel desired to complain. If the points which are now presented in this court had been called to the attention of the trial judge we cannot say what his ruling thereon would have been; and it would be manifestly unfair, not only to the trial court, but to the opposite party, to consider errors assigned to the instructions upon appeal, based upon matters that were not called to the attention of either upon the trial, or by a motion for a new trial.

The silence of the record upon these matters indicates either that the counsel then conducting the case for appellants were of opinion that they had but little cause of complaint upon the conduct of the trial, or that they purposely refrained from calling the attention of the trial court to many of the matters now complained of, in the hope that they would be overlooked below and furnish a ground for reversal here. Whatever may have been the reason controlling them then, in deference to well-settled rules of practice this court will not undertake to review such matters when presented here for the first time. *Webber v. Emmerson*, 3 Colo. 248; *Coon v. Rigden*, 4 Colo. 275.

By the last assignment of error the sufficiency of the plea of intervention is attacked. As the plea filed seems to meet all the requirements of the statute, and is in substantial compliance with approved forms, it must be held sufficient, particularly as against an objection raised for the first time in this court. Puter. Pl. & Pr. 633.

The judgment must be affirmed.

Affirmed.

DENVER & S. F. R'y Co. v. SCHOOL DISTRICT NO. 22 IN
ARAPAHOE COUNTY.

1. **A CONVEYANCE SUBJECT TO CONDITION VESTS A QUALIFIED FEE.**—A conveyance of lots to a school district by the owner in fee, by an ordinary quitclaim deed, subject to the condition inserted therein, that the lots were to be used for school purposes, and when such use should cease the property should revert to the grantor, vests in the grantee a qualified fee, and, until the happening of the event which is to determine the estate granted, the grantor is divested of all right, title and interest in the land.
2. **NO REVERSIONARY ESTATE IN GRANTOR CAPABLE OF CONVEYANCE UNTIL HAPPENING OF THE CONTINGENCY.**—Until the happening of such event the grantor is not vested with an estate in reversion, for the contingency upon which such an estate depends may never happen. Having nothing to convey, therefore, if he should assume, in expectancy of a possible reverter, to execute a deed to a subsequent purchaser, it would not invest his grantee with any right or interest in the land, present or contingent, but would be wholly without legal force or effect; and if the second grantee should enter into possession of a portion of the estate under such a conveyance, the owner of the qualified fee could oust him therefrom by an action of ejectment.
3. **FORCIBLE ATTEMPT TO ACQUIRE RIGHT OF WAY — EJECTMENT — ESTOPPEL.**—If a railway company without right enters upon the land of a citizen who is vested with the exclusive right of possession, and attempts to construct its road-bed over the same, the citizen may procure its expulsion by an action of ejectment, provided he does not acquiesce in the possession so taken, or, by affirmative acts, laches or other conduct, place himself and the railway company in such a position as to make it inequitable for him to insist upon a restoration of the possession. Conduct of the character mentioned would limit his recovery to the value of the land taken.

Appeal from District Court of Arapahoe County.

Messrs. WELLS, MCNEAL & TAYLOR, for appellant.

Mr. ENOS MILES, for appellee.

PATTISON, C. This was an action of ejectment brought by appellee to recover the possession of a strip of land one hundred feet in width, being part of lots 1, 2, 3 and

4, in block 3, in the town of Petersburg. The complaint alleges ownership and the right to the possession of the property.

The answer first puts in issue the allegations of the complaint. For an affirmative defense it is alleged, in substance, that on September 15, 1880, Peter Magnus, then the owner in fee of the lots mentioned, conveyed them to appellee, upon condition that the land should be used for school purposes, and that when such use should cease the property should revert to him; that on February 15, 1887, the appellee, not desiring to use the lots longer for school purposes, asked Magnus for other lots, which he on that day conveyed; that, in consideration of such conveyance, appellee agreed to vacate the lots in question, and remove the school-house therefrom, at the close of the term then in session.

It is then alleged that Magnus, relying upon appellee's agreement to vacate the premises, on March 2, 1887, conveyed the same to David G. Peabody; that thereafter Peabody conveyed the undivided one-half of said lots to William J. McGavock; that on July 1, 1887, and after the close of the school term, Peabody and McGavock, relying upon plaintiff's good faith and intention to perform the agreement made with Magnus, gave permission to defendant to enter upon and construct its railway over the strip of land described in the complaint, which was done at a cost of over \$1,000.

It is then alleged that appellant was not informed that plaintiff intended to use the lots for school purposes; that appellee had notice while the work was in progress that appellant was in possession of the land under the license given by Peabody and McGavock, and gave appellant no notice that it had or claimed any right or interest in the same; that afterwards, and on October 1, 1887, Peabody and McGavock conveyed the premises in question, with other lands, to appellant.

It is further averred that some time in September,

1887, after defendant had completed its railroad over the lots mentioned, appellee proposed to "Peabody and McGavock that, if they would convey to plaintiff, in lieu of the second aforesaid site conveyed to it by said Magnus, which had become unacceptable to plaintiff, an acceptable school-site, plaintiff would forthwith remove its school-house thither, and would convey said site conveyed to it by said Magnus to said Peabody and McGavock; and that said Peabody and McGavock offered to plaintiff, and plaintiff accepted, for its school-site, lots 1, 2, 3 and 4, in block 13, of said Englewood, situate in the said school district of plaintiff; and said McGavock being then absent from the state, and unable to join in the conveyance of the said last-named lots, plaintiff requested said Peabody to execute to plaintiff, and said Peabody did, to wit, on the 8th day of September, 1887, execute to plaintiff, his written agreement to convey jointly with said McGavock, upon his return to Denver, the said last-named lots to plaintiff, in consideration of \$1 and the removal of plaintiff's school-house; that plaintiff, in disregard of its aforesaid promises and agreements, and after said last-mentioned agreement, wrongfully re-entered upon the lots described in the complaint, and wrongfully re-opened its school in said school-house," etc.

No more of the answer need be recited. The affirmative defenses were put in issue by the replication, and upon the issues thus formed a trial was had, which resulted in a judgment for the appellee for possession of the premises.

The evidence tends to show that on September 15, 1880, Peter Magnus conveyed the premises above described, by quitclaim deed in the usual form, to the appellee. The deed contains the following covenant: "It is hereby agreed that the said above-described property is to be used for school purposes, and that, whenever it shall cease to be so used, the said property shall revert to the grantor herein, his heirs and assigns, and this said agree-

ment is hereby declared to be a covenant running with the said lots."

The premises had been occupied for school purposes prior to the execution and delivery of the deed, and were so occupied after the deed was made, and at the time the action was brought. Some time in the year 1886 some steps appear to have been taken to locate the school-house in some other part of the district. In that year Peter Magnus conveyed a tract of land, called the "Public Square in Petersburg," to the school district, for use in lieu of the premises in question. Under what circumstances this conveyance was made does not appear. The premises were never occupied by appellee for any purpose. The minutes of the meetings of appellee, which were introduced in evidence by appellant, show that on May 16, 1887, at an adjourned meeting of the school district, the question whether the school-house should be located in the center of the district, or in the public square of Petersburg, was voted upon. "The highest number of votes carried it to the center; being ten for, and six against." At the same meeting a committee was appointed, consisting of Thomas Skerrit, R. M. St. Clair and Adolph Candler, to locate the school-house site as near the center of the district as practicable.

On May 26, 1887, at a meeting of the school district, R. M. St. Clair was elected a director or trustee in place of Thomas Skerrit. The board then consisted of Robert M. St. Clair, Adolph Candler and Thomas Lockhart. March 2, 1887, Magnus conveyed the premises in question, with other lands, to Peabody. After the appointment of the committee to select a school-site, Skerrit, as one of that committee, had some talk with Peabody about another site for the school-house, which resulted in an agreement for the conveyance of other lots, but the precise terms of that agreement nowhere appear. The negotiations between Skerrit and Peabody seem to have taken place some time in June, 1887. No one of

the school directors took any part in the matter. Whether Skerrit reported the negotiations and agreement is not disclosed. The agreement was never acted upon by appellee in any way, and no conveyance of the lots selected was ever made by Peabody pursuant to the agreement. Immediately after the negotiations between Peabody and Skerrit, Peabody gave permission to appellant to construct its railway over the premises in controversy. This permission seems to have been given with the understanding that the school-house was to be removed, but no agreement to that effect had been made by any one having authority to represent the appellee. Neither does it appear that any one of the school trustees had notice that such an agreement had been made, or that permission had been given by Peabody to appellant to enter upon the premises.

Some time in July or August, but at what time the record does not clearly disclose, the employees of appellant entered upon the premises and began work. Very soon after entry was made, at an informal meeting, the school trustees named determined to take the steps necessary to protect the property. Lockhart went to Denver, and called upon Manning, the right of way agent, to ascertain by what right appellant had taken possession of the property. The interview with Manning resulted in nothing except the assertion by him of a claim of right under Peabody, and a promise to meet the school trustees at the school-house, upon a day named, to adjust the matter. Manning failed to keep the engagement, and thereupon a wire fence was built about the premises. When the contractors came to lay the ties and iron, they were notified not to enter upon the land. The notice was disregarded, the fence was torn down, the grading completed, and the ties and iron laid.

Before this suit was brought, another attempt appears to have been made by appellee to adjust the difference and avoid litigation. The trustees visited Manning again.

They were willing to accept other lots from Peabody, but they declined to surrender possession of the land in question unless the expense of removing the school-house was paid in advance. Manning refused to advance the sum of \$225, which was the sum demanded, but undertook to pay for removing the building after the work had been done. The proposition was not satisfactory to appellee, and it refused to accept it.

The first question to be determined is whether the license given by Peabody to appellant to enter upon the land in controversy conferred any right of entry, and whether the deed subsequently made by Peabody and McGavock vested appellant with any interest in the premises whatever.

The legal effect of the deed first made by Magnus to appellee is clearly apparent. It was in form an ordinary quitclaim deed, and divested the grantor of all his right, title and interest in the land. The covenant providing that, when the premises should be no longer used for school purposes, the title should revert to the grantor, was clearly a limitation. The title conveyed, therefore, was a qualified fee. Whenever the event might occur upon which the limitation was based, the estate of appellee would immediately cease. Nevertheless, until the happening of that event, appellee had the same right in, and the same dominion over, the estate that it would have had had there been no limitation whatsoever.

"Yet while the estate continues, and until the qualification upon which it is limited is at an end, the grantee has the same rights and privileges over his estate as if it were a fee-simple." *State v. Brown*, 27 N. J. Law, 13, 20, and authorities cited; Tied. Real Prop. §§ 44, 281.

As Magnus had conveyed his entire estate, it is clear that nothing remained to him which he could convey to Peabody, unless the limitation was such as to leave him vested with an estate in reversion which could be the subject of grant. Such reversion could not exist, how-

ever, unless, from the nature of the limitation, it appears that the event upon which it was based, in the nature of things, must happen. That event was the abandonment of the use of the premises for school purposes. It is manifest that such an event might never occur. The premises might always be used for the purpose for which they were conveyed. This being true, Magnus was not vested with a reversion, or an estate in reversion, and there was nothing left to him save the mere "possibility of a reverter." No interest in the estate, therefore, could pass by his deed to Peabody, and, as a matter of course, as Peabody took nothing he could convey nothing, either to McGavock or to the appellant. Whether these deeds might not operate as an assignment of the reversion or the possibility of reverter it is unnecessary to determine. It is sufficient to say that they did not convey the title or vest the grantees named in them with any right or interest, either present or contingent, in the body of the land itself. Tied. Real Prop. § 385; 2 Washb. Real Prop. 739.

It follows, therefore, that Peabody was without authority to grant the license under which entry was made; that his conveyance was without legal force or effect; and that appellant took possession of the premises without right.

When appellant entered upon the land, the title in fee, and the exclusive right of possession, was vested in appellee. The right of appellee to maintain ejectment, therefore, was perfect. That right was not lost, unless the conduct of its officers in the premises was such that equity and good conscience would require that the value of the land be sued for instead of the land itself. In other words, the right could not be lost except by estoppel or acquiescence in the taking.

It is undoubtedly true, when a railway company enters upon the land of a citizen, even though such entry be without right, and constructs thereon its road-bed, that

after the railway is finished and is being used by the railway company in the conduct of its business as a common carrier, and in the discharge of its duties to the public, the land-owner will not be permitted to maintain ejectment, but will be limited to a recovery of the value of the land, if it appears either that he has actually acquiesced in the possession of the railway company, or that by affirmative acts, laches or other conduct he has placed himself and the railway company in such a position as to make it inequitable for him to insist upon restoration of the possession of the land. But, to maintain such a defense to the action of ejectment, the evidence must be clear and decisive. It must appear that the land-owner did actually acquiesce either in the entry or in the occupation of his property. If this does not appear; if, on the contrary, the entry was made without the consent of the owner; if he has at all times used reasonable diligence to protect his property,—then the defense of estoppel or acquiescence cannot prevail. The theory that a man may be deprived of his property for public use, by the operation of an estoppel, or by acquiescence, is based upon considerations of the interest of the public at large.

Although the interests of the public are always entitled to serious consideration, yet the taking of property for public use, without right, cannot be justified, nor will the owner be restricted to compensation and damages, when he has at all times insisted upon his rights in the premises, and has applied to the courts for protection with reasonable diligence. Lewis, Em. Dom. § 648; Mills, Em. Dom. (2d ed.) §§ 140, 141; *Pickert v. Railway Co.* 25 N. J. Eq. 316; *McAulay v. Railway Co.* 33 Vt. 311; *Railway Co. v. Allen*, 113 Ind. 581; *Railroad Co. v. Soltwedde*, 36 Amer. & Eng. R. R. Cases, 577.

In this case there is no evidence upon which an estoppel can be predicated, or from which acquiescence can be inferred. In June, 1887, when Peabody assumed au-

thority to grant the license to appellant to enter upon the premises, he was without right or interest in the land. When appellant entered upon the land, appellee took the steps deemed necessary to protect the property. The officers visited Manning, only to be told by him that he had a right of way from Peabody, and that he would meet them at a future day. When he failed to do this, the property was fenced. From the beginning to the end of the transaction, the attitude of appellee was that of protest, and never that of acquiescence. When the road-bed was completed, Manning was again visited, and told the terms upon which appellee would yield its rights in the premises. These terms he refused to accept. Appellee then brought this action, which it had an undoubted right to do. The judgment is affirmed.

RICHMOND and REED, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

Affirmed.

MR. JUSTICE ELLIOTT not sitting.

MEAGHER ET AL. V. REED.

MINING COPARTNERSHIP — STATUTE OF FRAUDS NOT INVOLVED IN ACTION FOR SETTLEMENT OF ACCOUNTS AND DISTRIBUTION OF ASSETS. When the business of a partnership, organized to lease and operate a mine during a limited period for the sole purpose of making a profit through the extracting and marketing of ores therefrom, has been terminated in a suit brought by one of the partners to settle the partnership accounts and distribute the partnership profits and other assets, no interest in realty is involved. In such case the right to a settlement and distribution in no way depends upon the legal *status* of realty under the statute of frauds.

[*Per Reporter:* By the decision of this case, as announced by the court in its *per curiam*, some of the legal propositions discussed by Mr. Commissioner PATTISON are left undecided.]

14	335
3a	270
14	335
32	49
22	557
5a	372
14	335
23	164
23	524
14	335
24	232

Appeal from District Court of Lake County.

MESSRS. TELLER & ORAHOON and JOSEPH W. TAYLOR,
for appellants.

Mr. J. B. BISSELL, for appellee.

PATTISON, C. This is an appeal from a judgment and decree rendered the 24th day of December, 1884, in a suit in equity brought by Clinton Reed, the appellee, to recover an undivided one-fourth interest in a leasehold estate in a certain lode mining claim, known as the "Felicia Grace," situate in the consolidated ten-mile mining district, Summit county, Colorado, and for an accounting of the proceeds realized by the appellants in working that property.

The suit was predicated upon an alleged partnership agreement between appellants and three other persons, who will be named hereafter, and the issues presented to this court are: *First*, whether the partnership was established by the evidence; and, *second*, whether such evidence was legal and competent.

The first question necessarily involves a review of the evidence taken upon the trial. In the consideration of the case, only so much of the bill of complaint need be recited as defines the contract between the parties and their several interests in the property, and the proceeds of the property in controversy. It is alleged that in the month of April, 1884, the defendant J. C. Meagher, the plaintiff Clinton Reed, A. A. Smith, and John Van Avery, by parol, entered into an agreement of copartnership, wherein and whereby it was agreed by and between the said several parties that they would together obtain a lease upon the property known as the "Felicia Grace" lode mining claim, and, after obtaining the lease of said property from the owners thereof, would together, as an association or copartnership, enter upon and into said mining property, and prosecute the work of developing

and extracting the ore therefrom under and by virtue of the terms of said lease, for the joint benefit, profit and advantage of said several partners. That by the terms of said agreement the interests of said several parties were to be as follows: The said Reed was to be and become the owner of one-fourth thereof, paying his proportion of the expense of working and developing said claim, and working it, and receiving such proportion of the profits thereof. That the said Smith was to own and enjoy in like manner one-fourth and the said Meagher one-fourth. That by the terms of said agreement so entered into between the parties said Meagher was to procure from the owners of the property the lease thereof in his own name, and after its procurement to execute to the said parties proper and sufficient transfer and assignment of their interests therein. That thereafter, and in the said month of April, A. D. 1884, in accordance with the said terms of said partnership agreement so entered into between the parties, the said Meagher procured from the owners of the said property, in his own name, a lease thereof, for the period of eighteen months from the day of its execution. That said lease was executed by the owners of said property on or about the — day of April, A. D. 1884, and was thereafter duly recorded in the office of the recorder of deeds in Summit county, Colorado.

It is then alleged that after the execution and delivery of the lease, Meagher, on behalf of the copartnership, took possession, and began developing the property; that complainant, as he was bound to do, contributed materials and funds to aid in the prosecution of the common enterprise. It is unnecessary to state the other allegations of the complaint, such allegations being such as are usually found in a suit brought between partners for an accounting and distribution of partnership property.

The answer put in issue the allegations of the complaint, and interposed, as a separate defense, the statute

of frauds. The case was tried to the court. It is unnecessary to recite the findings of fact, except such as define the relation of the parties to each other, and constitute the basis of the decree. Such findings are as follows: "(1) In the fore part of April, 1884, the defendant John C. Meagher, the plaintiff, Clinton Reed, A. A. Smith and John Van Avery formed a copartnership for the purpose of procuring and working a lease on the Felicia Grace mine, situate in Summit county, Colorado; that each of said persons was to own an undivided one-fourth interest in said lease when the same was procured, and upon the suggestion of the defendant Meagher that he, being an owner of the property, could probably procure a lease on better terms than others, it was agreed that he should procure the lease in his own name, and after the procurement thereof should transfer to the other parties their respective interests, and until such transfer was made that he should hold their interests in his own name for their benefit. (2) That some time about the 24th day of April the lease was made, and on the 26th day of April Meagher and Patrick Barker, who succeeded to the interest of Van Avery in the premises, went to work. (3) Intervening the time when the agreement was made and the work commenced, Van Avery notified Meagher that he would not be able to take his interest in the lease. Thereupon, by agreement between Meagher and Barker and the other parties, Barker took that interest, an undivided one-fourth. (4) That such agreement and transfer was made prior to the time of the actual execution of the lease itself. (5) That on the 26th day of April work was commenced under the lease in accordance with the terms of the agreement antecedently made. That thereafter, on the 27th of April, as had been agreed, the defendant Meagher applied to A. A. Smith to furnish supplies under the copartnership arrangement. That on that day the plaintiff, Reed, sent Meagher the supplies asked for, amounting to the extent and value of \$13.05,

which was received by Meagher, and by him used in the prosecution of the enterprise. (6) That afterwards, and about the 1st day of May, Meagher wrote to A. A. Smith for \$25, to be used in the payment of the current expenses of the prosecution of the work. That the said sum so applied for was sent to him by the check of plaintiff, Reed. (7) That Meagher thereafter, and until the commencement of this suit, made no other request or application to Reed for other supplies or money to be used in and about the work. (8) That it was agreed at the time of the formation of the original copartnership arrangement with Meagher that the several parties were to contribute whatever supplies and money might be needed in the prosecution of the common enterprise only, and whenever they should be called for by Meagher for their proportion of the expenses." The other facts found by the court do not appear to be material to the discussion of the case.

By the twenty-third finding it is declared that the said lease will by its terms continue until October 24, 1885; that there has been opened in the said premises a large and valuable body of ore; that the developments show that during the continuance of the lease there will probably be taken, mined and removed from the said premises upwards of three thousand tons, at the rate at which said mine is now being worked; and that the ore so mined will be of the probable value of \$50 per ton, and of the net value of upwards of \$100,000, of which the said Reed's share will be about \$25,000.

By the twenty-fourth finding it is declared that the said Clinton Reed is now the owner of an undivided seven-thirty-seconds in the said lease, and entitled to that extent to share in the benefits and advantages accruing thereunder, and to that proportion of the profits of all the ores mined; and that he is entitled to occupy, possess and enjoy the said premises under the said lease with the said Meagher and the other defendants interested in said lease.

If these findings are sustained by legal and competent evidence, it is clear that the judgment and decree based upon them must be affirmed.

It is first necessary, therefore, to determine by a review of the entire case whether the findings of the court are warranted by the facts disclosed and established by the evidence. The evidence tends to prove that for some time prior to April 1, 1884, the appellant J. C. Meagher was one of the owners of the property in question. The property was undeveloped and its value unknown. A shaft had been sunk upon the premises to a considerable depth, but no valuable deposit of mineral had been found. In an adjoining property, known as the "Robinson Lode Mining Claim," a deposit of mineral had been discovered some time before, the dip or direction of which was towards the "Felicia Grace." Meagher having learned of this discovery, and believing that the same deposit or a continuation of it might be found within the territory of the property named, became desirous of securing a lease from his co-owners for the purpose of developing the property and ascertaining whether this deposit of mineral could be found. Being without means it was essential for him to associate others with him to aid in the enterprise. Some time in the month of March, 1884, Meagher met at Leadville one Dr. A. A. Smith, and had some conversation with him in relation to the matter. He succeeded in interesting Smith, and obtained from him a promise that he would undertake to pay one-fourth of the expense of developing the property if a lease was obtained, in consideration of the transfer to him of an undivided one-fourth interest in the lease when it was made. In this conversation it appears that Smith suggested that Clinton Reed would also take a quarter interest and pay one-fourth of the expenses. Before the lease was actually obtained a definite understanding was arrived at between Meagher, Smith and Reed that Reed and Smith would each pay one-fourth of the expense of developing the property, in consideration of which

Meagher undertook to transfer to each of them an undivided one-fourth interest in the lease when obtained. At about this time Meagher had some conversation with one John Van Avery in relation to the property. Van Avery then thought that he might also be able to take an interest in the property, and undertook to furnish an engine to be used in its development, in consideration of the transfer to him of a one-fourth interest if the lease should be obtained. The remaining one-fourth was to be held by Meagher, in consideration of his obtaining the lease and giving his time and labor to the working of the property. Before Meagher succeeded in obtaining the lease Van Avery decided that he would not interest himself in the enterprise, and so notified Meagher. Thereupon one Patrick Barker became interested to the extent of one-quarter, but upon what terms the record does not clearly disclose. After these conversations were had with the several parties named Meagher succeeded in obtaining a lease of the property for the term of eighteen months. The lease is in form a mining lease, and bears date April 26, 1884. It was made by John A. Hall, Jr., Martin Warner, Henry Woodford, James Dorland, George McClusky, J. W. Woodford, C. F. Woodford, W. N. Clark, C. H. Pierce and A. W. Etter, as lessors, and John C. Meagher, as lessee. No money was expended by Meagher, or by any of the parties, to obtain the lease. No rental is reserved by the lease, except that by its terms the lessee covenanted to pay to the lessors, as royalty, fifteen per cent. of the price paid or contracted to be paid for any ore extracted from the claim.

After the execution and delivery of the lease it appears to have been delivered by Meagher to Smith, who seems to have retained it for a considerable time. It was recorded in the office of the clerk and recorder of Summit county, Colorado, May 20, 1884. After the lease was secured Meagher and Patrick Barker immediately entered into the possession of the property, and began the work

of development. The relation of the parties as disclosed by the record at this time was clearly defined. There seems to be no uncertainty as to the intention of the parties in the premises. The lease had been acquired as contemplated by the several parties in interest, and apparently in consummation of the understanding and agreement which had been entered into between them. When Meagher and Barker began the work of development there seem to have been four parties interested, and their respective interests seem to have been equal.

Attention is now called to so much of the evidence as relates to the conduct of the parties under the agreement after possession was taken of the mine. On April 27, 1884, the day after the date of the lease, Meagher addressed a letter to Smith as follows: "Robinson, April 27, 1884. A. A. Smith, Esq.: I started to work yesterday in the sixty-foot shaft. I find by the Robinson mine maps that the mineral in their tunnel is going straight for the Felicia Grace. I was in to see the new strike, and I think it is going to be as big an ore-shoot as the old one. It is ten feet high, and can't tell how wide. John Hall was here and signed one copy of the lease. The other he will sign and send back. Sent it to him three or four days ago. I have taken this man Barker in. He is working with me here. I will have to put on another man. It will take three men to work this shaft. It is only about one hundred and twenty-five feet from the Robinson mineral, so I think we will get it in forty feet more, and if the water don't stop us I think we will be able to get there in thirty days. If we get water we will have to put up an engine. The snow is four or five feet deep, so we will have a hard time to get an engine here. If you see Van Avery tell him not to go to any expense until he hears from me that other arrangements might be made. If you and Mr. Reed take half of the lease there will be no interest left for Van. George and I took one-eighth each, and Barker one-fourth. John

Hall says he can't take an interest, as he is hard run for money. I wish you would send me ten pounds of giant powder; two hundred feet fuse; one box giant caps; one box candles; two hammer handles; two picks. Please send the bill. Yours, respectfully, JOHN C. MEAGHER."

Between April 27th and May 10th Meagher addressed a letter to Smith, asking him for \$25 to pay expenses. The letter was presented to Reed, who immediately gave his check for \$25, which was sent to Meagher, inclosed in the following letter: "Leadville, Colo., May 10, 1884. My dear John: Yours reached me to-day, and I hand you herewith Clint's check for amount called for. I hope you will catch on to some pay soon. I will back you up to the best of my ability till I get some money which I am looking for every day. I will try to get up to see you some time next week. Do the best you can, and write me any new developments in the meantime. Clint has no faith in the thing, but if we find some then he will have more faith. Yours truly, A. A. SMITH."

The supplies above mentioned were purchased by Reed, and sent about May 3d. On that day Smith wrote Meagher as follows: "Leadville, May 3, 1884. My dear John: Yours reached me on Tuesday, and, owing to the excitement of the convention, was not attended to at once, and Clint struck out for Denver, and only returned this morning, when I proceeded to bounce him roughshod, and have ordered the supplies, which will probably not reach you before Monday. As the express company will not take powder, it will have to go by freight. Clint and I take one-half of it. I think I will have plenty of money in a few days, and will not hesitate doing all in my power to push the work, and will not have to run Clint down every time anything is to be done. I regret the delay in your first order. You know I have always been prompt in our operations together heretofore. Let me hear from you. SMITH."

About the last of May it became necessary to obtain

an engine on account of trouble with water. Meagher left the mine and came to Leadville, and had some conversation with Reed in regard to this matter. Reed mentioned one or two engines which he thought he could obtain, but no definite arrangement was made. Meagher had an account showing the amount which had been expended in labor and supplies up to that time in the development of the property. The amount was \$285.60, and the share of Reed was stated to be \$71.40, less the \$38.05 he had heretofore paid. Reed inquired of Meagher at the time whether he wished him to pay the balance then due from him, to which Meagher replied that he did not, as Reed would be compelled to incur expense in obtaining and sending the engine to Robinson. No engine was obtained by Reed at any time. On June 7th Meagher addressed the following letter to him: "C. Reed, Esq., Leadville, Colo.—Dear Sir: I have written to Dr. Smith to know what you have done about the engine, and have not received answer. It is about time that we had this shaft down, as the Robinson company is running an incline towards us night and day. Write, and let me know what you can do. Yours respectfully, J. C. MEAGHER." This letter was received by Reed, but was not answered. June 9, 1884, the following letter was addressed to Meagher by Smith: "Dear John: I saw Clint a minute on Saturday, and I have not seen him since. Just now learned that he went to Denver last night again, and will not return until Tuesday or Friday. I don't think that he wants to do anything, or that he means to. The question is as to what we can do under the circumstances. I am still unable to do anything of myself, and if Clint won't do anything that seems to cook my goose till I am in a position to act for myself. If you can sell us out you had better do so, and I will make Clint surrender. I have received no money yet, and of course cannot tell when I will. No man can regret my circumstances more than I do myself, for I be-

lieve it to be a good thing. Would like to hold on. Yours truly, SMITH."

It does not appear that Reed had any knowledge that a letter of this tenor had been written by Smith, or that he had authorized or suggested that any sale of his interest should be made. June 14th another letter was addressed by Meagher to Reed, as follows: "Dear Sir: Not hearing from you, I have made an arrangement for an engine which will answer for the present. I received a letter from Dr. Smith saying he would have to give up his interest. I am very sorry that he can't carry his interest, as I think it is a good lease and must stop the Robinson company from going through to the Champion ground. Mr. Hall is here and will take an interest in the lease, and I would like to know what you intend to do. I am not going to give up after spending what I have. Hoping to hear from you soon, I am very truly yours, J. C. MEAGHER. P. S. Please tell Dr. Smith to send the lease to me. J. C. M." This letter was not received by Reed until some time in July, nor until after a large body of mineral had been discovered in the property. It appears that he was absent continuously from Leadville, on professional business, from about June 16th until some time in July. June 16th Smith wrote the following letter to Meagher: "Dear John: I finally had an interview with Clint, and he don't seem inclined to do anything at all, and tells me to sell the thing out; and if I could do so for enough to pay what we owe I would be glad to have you do it. I have not received any money yet. Would be very glad to stay in and put up, but I don't see how I can at present. Clint is going east soon—liable to leave on any train—to be gone a week or two. Can you see any chance to do anything? Let me hear from you at once. SMITH."

In relation to this letter Reed testified that he never had the interview with Smith mentioned, and that he never authorized Smith to direct Meagher to sell his in-

terest in the property. On June 12, 1884, Meagher addressed the following letter to Barker: "P. Barker, Esq., Leadville, Colo.—Dear Sir: I have been working on the lease since I returned, fixing for an engine, but the engine has not been shipped yet, and there is no telling when it will. The doctor did not get his money yet, and is unable to pay his part. I was to see Rice's engine yesterday, but it can't be got out of the snow for two or three weeks yet; so the only thing I can do is to work the shaft by hand until I can get an engine of some one here, as we can't get the one in Leadville without paying for it, and that we can't do at the present time. The water is about twenty feet from the top of the shaft, but I think we can hoist it out in three or four days, and then we may be able to keep it down easier than when we worked it before. I would like to hear from you as to what you think of the situation, and if you are coming back to work, or what you intend to do. You know I must work or give up the lease. I can get men here who will work for \$3 a day, but they must be paid at the end of each week or they will not work. Or their pay must be guarantied by some responsible person. Hoping to hear from you soon, I am very truly yours, J. C. MEAGHER." Smith never contributed any part of his share of the expenses. After June 14th, the date of his last letter, he seems to have relinquished all interest in the enterprise. Barker worked twenty-eight and one-half days, and then left the property and never returned. He appears to have transferred his interest to John A. Hall, one of the appellants.

After the conversation between Reed and Meagher in May, no demand appears to have been made upon Reed for money or supplies. No communication seems to have been had between them except the two letters of June 7th and June 14th, in which Meagher asks Reed what he is going to do in relation to the engine. Neither does it appear that Reed ever offered to contribute either money or supplies after that conversation was had. As

has already been stated, he was absent from Leadville during the greater part of June and July, and had no knowledge of the transactions in relation to the property hereinafter mentioned. It seems to have been his understanding at the time this conversation was had that there was so much snow at the mine that an engine could not be shipped at that time, and that Meagher should return to the property and perform the work necessary to prevent a forfeiture of the lease, as by its terms the suspension of the work for ten days would work such a forfeiture.

It further appears that after receiving the letter from Smith of June 16th Meagher began to dispose of interests in the property. On June 14th he made an arrangement with Samuel Rice and L. C. Swain to lease an engine, for which he was to pay \$25 per month. Afterwards, on July 1st, being unable to pay the rental of the engine, he transferred an eighth interest in the lease to Rice and Swain for the use of the engine and other considerations. Other interests were transferred by him for small sums of money and labor. In July a very large and valuable deposit of mineral was uncovered. When Reed returned to Leadville he demanded his interest in the lease and in the proceeds of the property, which was refused. Thereupon this suit was brought.

Upon the foregoing statement the first question naturally presented is whether a copartnership was ever actually entered into between Meagher, Reed, Smith and Van Avery, as declared by the court below by the first finding. A marked distinction exists in law between an agreement to enter into the copartnership relation at a future day and a copartnership actually consummated. It is an elementary principle that a partnership in fact cannot be predicated upon an agreement to enter into a copartnership at a future day unless it be shown that such agreement was actually consummated. In the language of the text-books, the partnership must be

"launched." To constitute the relation, therefore, the agreement between the parties must be an executed agreement. So long as it remains executory the partnership is inchoate, not having been called into being by the concerted action necessary under the partnership agreement. It is undoubtedly true that a partnership *in præsenti* may be constituted by an agreement if it appears that such was the intention of the parties. But where it expressly appears that the arrangement is contingent, or is to take effect at a future day, it is well settled that the relation of partners does not exist, and that, if one or more of them refuse to perform the agreement, there is no remedy between the parties except a suit in equity for specific performance or an action at law for the recovery of damages, should any be sustained. It is clear, therefore, that the first finding of the court, to the effect that the parties named entered into a copartnership for the purpose of acquiring the property in controversy, and engaging in a mining enterprise thereon, is unsustained by the evidence and unsupported by the law. At best, the negotiations had between these parties constituted but an undertaking on their part to enter into a joint relation upon the terms proposed; if Meagher should obtain a lease satisfactory to them. The several parties named having never undertaken the project together, Van Avery having decided to withdraw, it follows that as between them the partnership relation never existed. 1 Bates, Partn. § 78; *Wilson v. Campbell*, 5 Gilman, 383; Pars. Partn. 6.

Appellants' counsel claim that the finding of the court declaring that Meagher, Reed, Smith and Van Avery entered into a copartnership is unsustained by the evidence; that the second finding, that Barker, by consent of the parties, succeeded to the interest of Van Avery, is in legal effect a finding that a partnership agreement was made and a partnership relation entered into, different from that alleged in the complaint as the basis

of the action, and that there was, therefore, a fatal variance between the complaint and the proof. This proposition is predicated upon the principle that the relinquishment or transfer of his interest by a partner works a dissolution of the partnership. This contention is based upon the additional assumption that the partnership alleged, the partnership proved, if any, and the partnership found by the court was a general partnership, and subject to all of the legal and equitable principles incident to a commercial partnership of the usual character. Admitting this to be true, it does not follow upon the facts proven that the withdrawal of Van Avery from the agreement could have produced the result for which appellants contend. The mere refusal of a party to perform an executory agreement and to enter into the partnership relation cannot effect a dissolution, nor be followed by any of the legal consequences of a dissolution, for the reason that an executory contract of this nature does not constitute a partnership. Until the partnership agreement is consummated any one of the parties may refuse to enter upon its performance, and such refusal will simply subject him to an action for damages. It follows, therefore, that before the agreement is actually executed one party may withdraw with the consent of the others and another be substituted in his place. The fact, therefore, that the first finding of the court is not warranted by the evidence is not material unless it can be said that the fact that the complaint alleged a partnership between Meagher, Reed, Smith and Van Avery, while the proof established only an executory agreement between them from which Van Avery withdrew and in which Barker was substituted, was such a fatal variance as to require that the judgment be reversed. Upon this proposition very little need be said. It does not appear that the question was ever raised except in this court. Such variance is not assigned for error. Proof of the facts, upon which the second find-

ing of the court was predicated, was not objected to except upon the ground that such proof was incompetent under the statute of frauds. This question, therefore, may be passed without further consideration.

The second question suggested is whether a partnership relation between Meagher, Reed, Smith and Barker was established by the evidence, and, if so, what was its nature? The lease bears date April 26, 1884, and seems to have been executed about that time. Prior to this time a clear understanding existed between Meagher, Reed and Smith as to the enterprise and their relations and interests in it. It was settled that Reed should take and carry the burden of an undivided one-fourth interest. The interest of Smith appears to have been the same. In the letter of April 27th addressed by Meagher to Smith it is stated that Barker was to have one-fourth. It appears that Barker and Meagher went to the property together and began work, and that after this time Hall came to Robinson and signed the lease. At the time the enterprise was set on foot, and prior to the execution of the lease, the four parties named seem to have undertaken to acquire a lease of the property in question, and to develop and work the same for the purpose of extracting the mineral therefrom, and to pay the expenses and share the profits, if any, in accordance with their respective interests therein. That this arrangement constituted a partnership between the parties cannot be doubted. What was the nature of the partnership? Was it a general partnership, and subject to all the incidents and principles of the law of partnership, or was it a mining partnership, as defined in the text-books and by the authorities?

In England and in America the operation of mines has long been considered a species of trade. The nature of the business, and particularly the necessity for the continuous operation of mines, the practical impossibility of each owner acting independently, and the consequent

necessity of community of interest in the conduct of the business, have induced a careful consideration by the courts, in the many cases which have arisen, of the principles of law and equity properly and legally applicable to the business of mining, and the relation of mine-owners to each other. The result has been the application to the relation of co-owners of mines, at least while engaged in their joint operations, of the principles of partnership law so far as such application has been essential to the successful prosecution of mining operations, and the protection of the rights and interests of the parties as between themselves and towards third persons. In law the owners of mines hold their property as joint tenants or tenants in common, and not as partners. The courts in applying the principles of the law of partnership to the relation of such owners, when conducting mining operations upon their property, have departed from the principles of the law of co-tenancy only so far as the nature of the business and the rights and interests growing out of the business and the remedies for their enforcement and protection have seemed to require. For this reason a mining partnership has been usually, if not always, considered and treated as a particular and not a general partnership. It is undoubtedly a general rule that when two or more persons acquire mining property solely or principally for the purpose of extracting the ores, in the absence of an express intention to enter into a general commercial partnership in the conduct of their mining operations, the relation existing between them in the transaction of their common business is a mining partnership, and not a general partnership: 1 Bates, Partn. § 163.

In this case the principal if not the sole object of obtaining the lease of the "Felicia Grace" was the extraction of ores from the property. It is claimed by appellants that the partnership alleged in the complaint and found by the court is a general or commercial partnership,

which would be necessarily dissolved by the transfer of the interest of any one of the parties. It is clear that this position is untenable unless the evidence clearly establishes the fact that it was the intention of the parties to enter into such a relation. That there is no such evidence is apparent. Neither is there any fact or circumstance upon which the conclusion that such was the intention of the parties can be predicated. The relation, therefore, between Meagher, Reed, Smith and Barker, when the lease was obtained and at the time and after the work was begun, was that of a mining partnership, the members of which were changed from time to time as the work went on. In *Collier on Mines* (star page 88) it is said: "A question of some nicety sometimes arises whether persons working mines are trading partners or mere joint occupiers of the land, using the minerals as part of its produce. The result of the cases on this subject (some of which are somewhat conflicting) may be stated to be that this question will turn on the consideration whether the land be obtained wholly or principally for the purpose of trading in the ore, or whether the selling of the ore be only incidental or appurtenant to the occupation of the land. Where, however, companies of adventurers have been formed for the purpose of mining, and obtained leases either of the land or the minerals, or license to work in pursuance of that object, the courts of equity have long since recognized such associations as a species of trading partnership." Again, at page 89, it is said: "The dissolution of partnerships so numerous by death, bankruptcy, outlawry, or felony of any one partner, would have been incompatible with that continuous working of a mine which is necessary to success. It would have been highly inconvenient if no partner had been allowed to part with his share without the consent of each of his copartners. Moreover, the spirit of speculation and adventure, without which concerns so hazardous as those of mining would seldom be

commenced or persevered in, and the fluctuating nature of the property, indicated the expediency of a ready transferability of shares. Again, it would have been somewhat hard upon the mining adventurer if each of his associates, whom he had not the means of selecting, had power to bind him by engagements with the public as extensive as those of partners in ordinary trading concerns. Accordingly, mining partnerships were early recognized as differing from ordinary trading partnerships in not being founded on *delectus personæ*, from which principle the rights and obligations of ordinary trading partners are mainly derived. It was decided, after many doubts, that the mining partner had a right either to relinquish or transfer his share without the consent of his copartners, and that upon his death or bankruptcy the law, instead of dissolving the partnership, would transfer it to his executors or assignees, and the power of partners to bind each other by engagements entered into with non-partners were restricted." Finally, the author, after reviewing numerous cases, at page 125 says: "The result of the foregoing cases may perhaps be thus shortly stated: That a mining company is a trading partnership, a share of which may be acquired without such a conveyance as is necessary to pass an interest in land; that it differs from ordinary trading partnerships in not being founded on the *delectus personæ*, a difference which limits the powers of mining partners; that the mere constitution of such a company is no evidence of an implied authority from one partner to another to pledge his credit by drawing bills of exchange or borrowing money, even on the greatest emergency; that such constitution is, however, evidence for the jury of authority to order necessities on credit; that, wherever there is any question for the jury of implied authority, either to a mere partner or to a manager, the proper direction to them is to consider whether it be

proved that such authority is necessary to the carrying on of the concern or usual in similar concerns."

These principles have been recognized again and again by the courts of England and this country. *Crawshay v. Maule*, 1 Swanst. 495; *Fereday v. Wightwick*, 1 Russ. & M. 45; *Williams v. Attenborough*, 1 Turn. & R. 70; *Dickinson v. Valpy*, 10 Barn. & C. 128; Colly. Partn. §§ 801, 808; 1 Bates, Partn. § 163; *Charles v. Eshleman*, 5 Colo. 107; *Manville v. Parks*, 7 Colo. 128; *Skillman v. Lachman*, 23 Cal. 199; *Duryea v. Burt*, 28 Cal. 569; *Kahn v. Smelting Co.* 102 U. S. 641; *Bissell v. Foss*, 114 U. S. 252, 260; *Rock. Mines*, 574; *Lamar v. Hale*, 79 Va. 147.

The cases cited not only clearly define the nature of a mining partnership, and distinguish such a partnership from a general partnership, but they also show that, except in the particulars mentioned, the affairs of a mining partnership are governed by the same principles in equity as a general partnership. In no case does this appear more clearly than in *Fereday v. Wightwick*, *supra*: "A lease was taken of certain mines, the lessees consisting of six persons; at the same time a lease was taken of the surface of the property. The mines and surface were used with a communion of expense and a communion of profit. The first question is whether this is a partnership property liable to be sold and disposed of to pay the partnership debts, and whether, a partner having sold part of his shares, his interest is to be considered subject, in the first place, to repayment of what is due from him to the partnership. This question is concluded by authority, but I am willing to decide it upon principle. Mining concerns are to some purposes trading concerns, but they are not so to all. They are not so in this particular, viz., that they are not, as an ordinary partnership trade, subject to dissolution on the death or bankruptcy of any of the partners, and the shares are

transferable without the consent of the partners. In these particular instances, they have not all the incidents of a trading concern. In other respects, it has been repeatedly held that they have. Now, it is a universal principle in regard to all property, whether real or personal, acquired for the purpose of a partnership, that property so acquired is, upon the dissolution of the partnership, subject to sale and accounts between the partners, and to payment of the partnership debts. That is a universal principle.

“To apply the rule to this particular case, the property was acquired by these partners for the purpose of the partnership concern. Therefore, though in the nature of real property it is subject to all the debts of the partnership, and subject to the debts of one of the partners incurred in the administration of the property, there can be no doubt that the plaintiffs have a right to make this claim.” These principles are clearly stated and elaborated in *Duryea v. Burt*, *supra*. The relation, then, which existed between the parties before and at the time appellant Meagher obtained the lease of the property in question, was that of mining partners. The lease having been acquired by Meagher as one of the partners, pursuant to and in consummation of the partnership agreement, and the property having been applied to the uses of the partnership for the purpose of conducting the business of mining thereon, the interest in the property, to wit, the leasehold estate, must be deemed to be partnership property.

Third. That the interest in the premises acquired by the lease is an interest in lands, within the meaning of the statute of frauds, cannot be doubted. The question to be now determined is whether the arrangement or agreement between the parties, upon which the appellee predicated his rights in the premises, could be established by parol testimony. Can a copartnership entered into for the prosecution of a specific venture, necessarily re-

quiring the acquisition of an interest in a particular parcel of land, be proven by parol, or is such an agreement within the provisions of the statute of frauds of this state? Gen. St. § 1515. That such a partnership differs very materially from a partnership entered into to trade in lands is manifest. Nevertheless, as the reasoning of the authorities maintaining the affirmative of the question would seem to apply to partnerships of either class, a review of the whole subject seems to be necessary. This precise question has never been presented to nor passed upon by this court. In the case of *Murley v. Ennis*, 2 Colo. 300, the agreement construed was stated by the court in the following language: "If two or more go into the public domain together to search and explore for mines, with the agreement to occupy and develop such discoveries as may be made for the joint benefit, and such discovery, development and joint occupation follow, it is clear that while each explorer becomes invested with his due share and estate in the premises no provision of the statute of frauds is violated.

* * * But in the case supposed neither of the parties has at the date of the association any interest or estate which can be the subject of sale, and the contract of association does not contemplate that either shall part with any. Nor does the interest or estate which is afterwards acquired vest or inure by virtue of the agreement, but by the occupation and appropriation alone." Such an agreement is clearly distinguishable from that under discussion. The question was incidentally considered in *Kayser v. Maugham*, 8 Colo. 232, but was not involved in the decision of the case. The court said: "It is true that a trust in lands cannot be predicated upon proof of an oral agreement to create a partnership for the purpose of purchasing and handling or improving such lands, the partnership relation not having existed prior to the acquisition of title, and no partnership funds having been invested in the property. To recognize a trust in such

cases would be to abrogate the *statuté of frauds* in this particular; it might as well be said that an oral contract providing directly for the purchase of an interest in lands is not obnoxious thereto. But the foregoing principle is not applicable to the case at bar, for the reason that here the partnership existed several months prior to the acquiring of title by defendants; that the partnership contract does not rest entirely in *parol*; and that the purchase of the mine was not contemplated by this contract."

The proposition actually decided is that contained in the last clause of the paragraph quoted. The counterpart of that proposition is that which is involved in this case, to wit, whether a partnership agreement to acquire a lease of a particular property for the purpose of extracting ores therefrom, made before the lease has been obtained, can be proved by *parol*, when it appears that it was acquired in the name of one of the partners pursuant to the agreement, and applied to partnership uses under the agreement. It is a well-settled elementary principle that if a partnership be proven to exist by competent evidence it may be shown by *parol* that a whole or a part of its assets consist of real estate. The real question now presented is whether the fact that the acquisition of a leasehold interest in the property in question was actually contemplated at the time the contract was made changes the rule of evidence so as to require that such contract be proven by an instrument in writing. It is also an elementary principle that a contract to enter into a copartnership in a business which requires the acquisition of an interest in land as a necessary incident to the business may be proven by *parol*. The question here presented is whether a *parol* agreement to acquire a leasehold interest in a particular mine, as a necessary incident to the development of the property, and the extraction of ores therefrom, is within the *statute of frauds*. The further question is also presented whether the fact that by the terms of the agreement the interest in the mine

was to be acquired by one, and the respective interests of the others transferred to them by him, in any wise change the rule applicable to the case. And finally, the general proposition is presented whether in this and in all cases of this nature the ultimate and only issue to be determined is not whether the property in controversy is or is not partnership property, within the meaning of the principles of partnership law. If this be found to be the real issue, then it necessarily follows that neither the statute of frauds nor the law of trusts has any application to the case. There is a very considerable conflict in the authorities bearing upon these questions.

Whether a partnership to trade in lands can be proven by parol has frequently been considered by the courts. The question has been discussed with great ingenuity, learning and ability by many able jurists, but, even when the authorities are in harmony, the reasons and principles upon which the decisions have been predicated are by no means the same. In many cases the law of trusts, with its doubts and uncertainties, has been invoked, and the issue determined by applying principles, the application of which was by no means certain. It has been assumed that for all purposes an interest in lands must be held by a title, either legal or equitable, within the meaning of the law. This is undoubtedly true; but to define this title it is not necessary to resort to the law of trusts. If the land is partnership property, the title is vested in the partnership, and is defined, governed and controlled by well-settled principles of partnership law; and this is true whether the title is vested in one of the partners, or in all.

A careful analysis of the more recent authorities clearly discloses a marked tendency to limit the issue to two independent propositions: *First*, is there a partnership? This may be proven by competent evidence. *Second*, of what does the partnership property consist? If of real estate, its treatment and disposition are regu-

lated by the principles of partnership law, without reference to the title or its character as realty. In *Bates on Partnership*, § 281 (the latest work on this branch of the law), the following language is found: "Real estate bought or leased with partnership funds, for partnership purposes, and applied to partnership uses, is deemed to be partnership property whether the title is in all the partners as tenants in common or in less than all, in the absence of any agreement. There is no necessity for any agreement in such cases. The statute of frauds has no application, but the title is held in trust for the firm. So of property originally contributed as stock, or if originally paid for by each out of his separate means, or brought into the use of the firm at its formation and subsequently agreed to be converted into partnership property, it becomes part of the capital." Is not this rule applicable to all cases where lands are purchased or leased for partnership purposes, whether the purchase of such lands or the leasing of the same was either an incident of the business of the copartnership or the express object for which it was formed? The same author, at section 301, says: "Where a partnership holds land, not as the chief purpose of its existence, but as an incident to the business, the statute of frauds does not apply, and the land may be shown to be a part of the partnership stock, and affected with partnership equities, by oral evidence. The partnership requires no writing to prove it, and exists outside of the ownership of real estate." Section 302: "The authorities are divided on the question whether a partnership to trade in lands may be proved by parol in order to affect the lands with partnership liabilities and equities. The preponderance is in favor of considering that the statute does not apply if the land was or is to be purchased with the joint fund, whether the title be taken in one or all." And, commenting upon the authorities cited in support of the text, the author defines the real question out of which the

conflict of authorities has arisen. "In those cases the partnership was formed to deal in land, and was not itself a transfer of the title, the land not being bought by the contract of partnership, but in pursuance of it, and out of the partnership funds. In the present class of cases the contract itself purported to be a transfer of interest."

In 1 Lindley on Partnership, 88, the author says: "With respect to that part of the fourth section of the statute of frauds which relates to lands, it is held (1) that a partnership constituted without writing is as valid as one constituted by writing; and (2) that, if a partnership is proved to exist, then it may be shown by parol evidence that its property consists of land." The opposite view is adopted by Judge Story in his work on Partnership. At section 83 he says: "But although there is no positive incompetency at the common law of creating a partnership in the buying and selling of lands on joint account, and for the benefit of the parties by way of commercial speculation and commercial adventure, yet such a contract must, from the nature of the case and the positive rules of law and the statute of frauds, be reduced to writing; and then the stipulations of the parties will constitute the sole rule to ascertain their intent and to enforce their respective rights."

Do the authorities sustain the principles of the author last cited? The leading case in support of this proposition is *Smith v. Burnham*, 3 Sumn. 435. In this case, after commenting upon the provisions of the statute of frauds, it is said: "Now, taking these clauses together, or separately, the same conclusion would seem to follow as to the parol agreement in the present case. If the agreement could be treated as a sale by the defendant to the plaintiff of any interest in the lands to be purchased, it would be within the statute. If it could be treated as the case of an estate created in lands, it would be a mere estate at will, which would defeat the whole intention of

the agreement and the whole object of the bill. I incline to think that it properly falls under neither of these predicaments, but that it is the case of the declaration or creation of a trust or confidence in lands, not arising or resulting by implication or operation of law. The trust arises *eo instanti* upon each purchase, and is then to attach, if at all. * * * It has been ingeniously argued that the interest of the plaintiff is in a moiety of the profits or proceeds of the sale, and not in the land itself, and that therefore, at least when the land has been sold by the defendant, the agreement attaches to the moiety of the proceeds. But the agreement, if good at all, attaches also to the land at the time of the purchase, and it is then an agreement for an interest by way of trust in the land, a sort of springing trust; and it is in virtue of this trust-estate, and of this only, that any right can attach to the moiety of the proceeds. The right to follow the proceeds is a right which, if it exists at all, flows from the interest in the lands, and the trust created in favor of the plaintiff. It is not collateral, but direct." Again he says, at page 461: "Then it seems clear that this is not the case of a resulting trust by implication or construction of law. It is not the purchase of an estate by one man in the name of another, where the purchase money is paid by the former, and the deed taken in the name of the latter. It is not the case of a purchase confessedly paid for out of the funds of an existing partnership for partnership purposes, and the deed taken in the name of one partner. In each of these cases a resulting trust will arise by operation of law in favor of the party or parties advancing the money. * * * The trust in the present case, if any there was, was one arising directly *ex contractu*, and not by implication or operation of law."

In the above case it will be seen that a contract of partnership entered into for the purpose of trading in lands is regarded as a contract in respect to an interest

in lands, within the meaning of the statute. It is assumed that such interest in land, or a trust therein, is transferred or created by the contract itself; that such interest or trust cannot be separated from the contract of copartnership; and that the issue in such cases is not alone whether a copartnership was entered into, but whether a copartnership was entered into the purpose of which was to acquire an interest in land. If such was the object of the agreement, then perforce of that fact it comes within the statute, and cannot be proved by parol.

This view of the question is adopted in a number of authorities, the most important of which is *Bird v. Morrison*, 12 Wis. 138. The court at page 155 say: "These cases, therefore, go no further than to establish three propositions: (1) Where real estate is bought with partnership funds for partnership purposes, there is a resulting trust in favor of the partnership, though the title be taken in the name of one. (2) Where the title is held by all the partners jointly, so as to be entirely consistent with the character of partnership property, the fact of partnership may be shown by parol, and that the property was held for partnership purposes, and from these facts the law will imply its partnership character, and such trusts as resulted therefrom. (3) A partnership in any branch of trade or business may be shown by parol as an existing fact, and then whatever real estate is held for the purpose of such business is regarded as an incident thereto, and the law will imply a trust in favor of the partnership, where the legal title is not in all." And, as an illustration of the application of the principle contained in the third paragraph quoted, he says, page 159: "If the bill had alleged that the partnership extended to the carrying on of a hotel business, that would have been a partnership, and might, so far as the hotel lots were concerned, have laid the foundation for applying the doctrine of implied trust to the real estate used for the hotel, as being incident to the business. But it only alleges

that they were to build a hotel, and this does not make it a partnership, more than it would if they had built a boarding-house or a mill." So far as the particular question under discussion is concerned, the correctness of the judgment under review might be rested upon the principles above stated alone. The acquisition of the lease was but an incident to the business contemplated, to wit, the extraction of the ores. The law would therefore necessarily imply a trust for the benefit of the members of the copartnership in the leasehold estate. But it is unnecessary to rest the case upon so narrow a principle, for the reason, as it will clearly appear, that by the decided weight of authority a partnership to deal in lands may be established by parol. The leading case upon the subject is *Dale v. Hamilton*, 5 Hare, 369. The conclusion arrived at, after prolonged argument and careful consideration, is stated in the syllabus in the following language: "A partnership agreement between A. and B. that they shall be jointly interested in a speculation for buying, improving for sale, and selling lands, may be proved without being evidenced by any writing, signed by or by the authority of the party to be charged therewith within the statute of frauds; and, such an agreement being proved, A. or B. may establish his interest in land, the subject of the partnership, without such interests being evidenced by any such writing." In *Forster v. Hale*, 5 Ves. Jr. 308, Lord Chancellor Loughborough observed, in response to the suggestion that the question was whether there was a declaration of trust within the statute of frauds: "That was not the question. It was whether there was a partnership. The subject being an agreement for land, the question, then, is whether there was a resulting trust for that partnership by operation of law. The question of partnership must be tried as a fact, as if there was an issue upon it. If, by facts and circumstances, it is established as a fact that these persons were partners in the colliery, in which

land was necessary to carry on the trade, the lease goes as an incident. The partnership being established by evidence upon which a partnership may be found, the premises necessary for the purposes of that partnership are, by operation of law, held for the purposes of that partnership."

A like principle is laid down in *Essex v. Essex*, 20 Beav. 442. Attention is now particularly called to the language of the court in *Chester v. Dickerson*, 54 N. Y. 1: "On the other hand it is claimed that such an agreement is not affected by the statute of frauds, for the reason that the real estate is treated and administered in equity as personal property for all the purposes of the partnership. A court of equity having full jurisdiction of all cases between partners touching the partnership property, it is claimed that it will inquire into, take an account of, and administer upon all the partnership property, whether it be real or personal, and in such cases will not allow one partner to commit a fraud or a breach of trust upon his copartner by taking advantage of the statute of frauds." Citing cases. "I am inclined to think this doctrine to be founded upon the best reason and the most authority. * * * But suppose two persons by parol agreement enter into a partnership to speculate in lands, how do they come in conflict with the statute of frauds? No estate or interest in land has been granted, assigned or declared. When the agreement is made no lands are owned by the firm, and neither party attempts to convey or assign any to the other. The contract is a valid one, and in pursuance of this agreement they go on and buy, improve and sell lands. While they are doing this, do they not act as partners, and bear partnership relations to each other? Within the meaning of the statute in such cases, neither conveys or assigns any land to the other, and hence there is no conflict in the statute. The statute is not so broad as to prevent proof by parol of an interest in lands. It is simply aimed at

the creation or conveyance of an estate in lands without a writing." Again, in the case of *Fairchild v. Fairchild*, 64 N. Y. 471, Church, C. J., uses the following language: "Real estate purchased as partnership property is not within the prohibition of the statute. In the first place it is not the case where the consideration is paid by one person, and a conveyance taken in the name of another. The consideration is paid by all. It is not, therefore, within the letter of the statute. But a more substantial reason is that property thus held is regarded as personal property, for the purpose of paying debts and adjusting the equities between the partners, and the individual member holding the legal title is a trustee for the partnership in respect to the property as personalty; and when the debts are paid and the claims of the several members as between themselves paid, the trust for the partnership is discharged, and a trust results to the other members of the firm, and the heirs of such as have died, in the remainder, by operation of law, which is saved by section 50 of the statute; and the holder of the legal title then becomes a trustee of such remainder, as real estate, for the benefit of persons interested." *Traphagen v. Burt*, 67 N. Y. 30; *Wormser v. Meyer*, 54 How. Pr. 189; *Bissell v. Harrington*, 18 Hun, 81. This same rule has been adopted in Indiana. *Holmes v. McCray*, 51 Ind. 358. Also, in *Bopp v. Fox*, 63 Ill. 540; *Wallace v. Carpenter*, 85 Ill. 590. In *Allison v. Perry*, 22 N. E. Rep. 492, decided in October last, the same court declares that "the law does not require that the agreement of copartnership shall be in writing to enable the firm to purchase lands. Where a partnership is constituted under a parol agreement, it may be shown that its property consists of land, and it may own, possess and enjoy the same."

In this case the partnership was entered into for the purchase of coal lands, and the development of the same, with a view to profit. This doctrine is adopted by the supreme court of Iowa in many well-considered cases.

York v. Clemens, 41 Iowa, 95. In *Richards v. Grinnell*, 63 Iowa, 44, it is held that, "while the decisions are conflicting, the decided weight of authority, as well as sound reason and correct principles, supports the conclusions reached in this case, that a contract of partnership for the purpose of dealing in real estate is not void under the statute of frauds because it is not evidenced by any writing, but rests in parol; and, after the dissolution of such partnership, either partner may establish his interest in the partnership without such interest being evidenced by any such written contract." In the course of the opinion Rothrock, C. J., says: "We think the cases above cited are in accord with the decided weight of authority, and in our opinion they are founded upon sound reason and correct principles. It is everywhere held that, where land is held by a partnership, it is, as between the parties, and as to the creditors of the firm, to be treated as personal property. Such being the law, it would seem to follow that the statute of frauds can have no application to lands thus held and owned." In *Pennybacker v. Leary*, 65 Iowa, 220, Beck, J., says in the following language: "It will be observed that the lands, as we have before stated, were not purchased by the contract for the copartnership, but by a subsequent purchase made in pursuance thereof. The case, then, assumes the aspect of the purchase of lands by a copartnership. While the title of the lands was under this purchase vested in defendant, they were really held by him in trust as partnership property. Plaintiff's interest in the lands is that of a partner, as prescribed by the contract of copartnership."

A like doctrine has been adopted by the supreme court of California. In *Coward v. Clanton*, 21 Pac. Rep. 359, in the course of the opinion, Works, J., says: "The defendant contends in this court that, conceding that the contract was one of partnership, as it was in parol, it was within the statute of frauds, and cannot for that

reason be enforced. It was held by this court in an early case that a partnership the object of which was to deal in real estate could not be formed by a contract resting in parol. *Gray v. Palmer*, 9 Cal. 616, 639. The question seems not to have been very thoroughly considered, and the case is clearly against the great weight of authority." The same doctrine prevails in Oregon. *Knott v. Knott*, 6 Or. 142. Also in Montana. *Hirbour v. Reed-ing*, 3 Mont. 13. To the extent of holding that a partnership entered into to share the profits realized from speculation in lands, the rule has been recognized in Connecticut, Missouri and Minnesota. *Bunnel v. Taintor*, 4 Conn. 568; *Snyder v. Wolford*, 33 Minn. 175; *Hunter v. Whitehead*, 42 Mo. 524. The numerous authorities cited clearly establish the proposition that a partnership entered into to trade in lands can be established by parol. It therefore follows that the admission of the testimony offered by appellee in the court below to establish a copartnership for the purpose of acquiring a lease of the "Felicia Grace" and carrying on the business of mining thereon was not error.

It has already been said that upon the facts proven the nature of the partnership was that of a mining partnership. But whether it was a mining or a general partnership is immaterial in the discussion of the question now presented. That question is suggested in the consideration of the authority of Meagher to dispose of interests in the lease. For the purposes of this case it is not necessary to determine to what extent the real estate belonging to the copartnership is converted into personal property, nor when, in equity, it ceases to be regarded as personal property, and becomes real estate. It is sufficient to say that the real estate of a mining partnership is, in equity, treated in precisely the same manner as the real estate of a general or commercial partnership. *Duryea v. Burt*, 28 Cal. 569, *supra*; *Settembre v. Putnam*, 30 Cal. 490.

Had Meagher any authority to transfer any interest in the leasehold estate except his own, without the authority and consent of his associates? If he could not, then it follows that the transfers made by him must be confined in their effect to his interests alone. This question is determined by principles so well settled as to be elementary. In *Parsons on Partnership*, p. 376, it is said: "No partner, and no proportion of the partners, can sell or transfer the real estate of the firm outright for money, or by way of mortgage to secure a debt, or to assignees in trust for debts, without the consent or authority of the other partners. On the first point, that he who happens to have the legal title cannot sell the real estate without the consent and authority of the rest, so as to give title to a grantee having notice, * * * we are quite sure that must be the law; and, if he make a mortgage to secure a debt or an assignment in trust for creditors by which the legal title would pass, it seems that equity will not sustain the transaction, even supposing it free from taint of fraud." 1 *Bates, Partn.* §§ 403-405.

Finally, it is contended that appellee abandoned his interest, and that Meagher had a right to treat the same as forfeited. This proposition is entirely untenable. There is no evidence to warrant it. The claim is predicated upon the fact that Reed failed to answer the letter addressed to him by Meagher on or about the 7th of June, and that for a period of less than six weeks he gave no attention to the enterprise. This is not sufficient to justify the conclusion that he had abandoned, or intended to abandon and forfeit, his interest. If in the month of July, 1884, instead of uncovering a valuable deposit of mineral, the parties had discovered that the property was absolutely barren, and had instituted an action against appellee for the contribution of his share of the expense, could he then have been heard to say, in defense of such an action, that he had abandoned the enterprise in the month of June, and that he was there-

fore not liable? Certainly not. The language of the chancellor in the case of *Hartman v. Woehr*, 18 N. J. Eq. 383, is suggestive in this connection: "They deny that he is or ever was a partner, on the ground that he has never complied with the partnership agreement by paying up his share of the capital. The position taken on their part is that until that is paid up he is not admitted as a partner. But this agreement was for a partnership to commence immediately and to continue for five years. The partners each agreed to pay in \$10,000 of the capital, but it was not a condition precedent. The complainant, by his deed, paid up at the time of the agreement, \$5,667 of his share, and the defendants accepted it, and used, and continued to use, the property in the partnership business. Neither of them paid up his share at that time, but at intervals of weeks or months afterwards; but the business of the partnership, the erecting of the brewery and manufacture of beer, went on. Each contributed some capital and labor. The existence of a partnership does not depend upon the fact that each partner has in all things complied with his agreement. If the contract has been made, property and labor contributed, and the partnership business commenced or carried on to any extent, there is a partnership: The defendants had a remedy if he did not comply with his engagement. They could have asked for a dissolution, and paid him back the amount he put in, and formed a new partnership. But under this agreement he was a partner for five years, unless the partnership was sooner dissolved." So in this case Meagher and his associates had the right to demand that appellee perform his agreement and contribute the share of the expense which he was obliged to contribute by the agreement. If he refused to comply with such demand then they might have assumed that the partnership was at an end so far as he was concerned. But no demand was made, except so far as such demand may be inferred from letters of June 7 and June 14, 1884.

But it affirmatively appears that these letters, except that of June 7th, did not reach the hands of Reed until some time in July, after Meagher had assumed that he had abandoned the enterprise, and had undertaken to sell his interest to other parties. Such conduct on the part of Meagher was entirely unwarranted by the circumstances, and in violation of appellee's rights in the premises.

Many other questions are suggested by the argument of counsel in this case, but it is not deemed necessary to consider them. Many findings of the court have been discussed by counsel for appellants with great ability, for the purpose of showing that they are not sustained by the evidence. It may be that some of them are unwarranted, but if the conclusions already reached are correct they are sufficient to sustain the decree. The judgment should be affirmed.

Affirmed.

RICHMOND and REED, CC., concur.

PER CURIAM. The principal purpose of the partnership, as stated in the exhaustive opinion of Commissioner PATTISON, was to carry on the business of extracting and marketing ores during the period specified. This purpose has been accomplished, and it only remains to settle the partnership affairs, and distribute the partnership assets. These assets include no interest in realty, and, in our judgment, the right to a settlement and distribution does not depend upon the legal *status*, under the statute of frauds, of such an interest. The judgment of the court below is accordingly affirmed.

ELLIOTT, J., dissenting.

LEWIS V. BOARD OF COMMISSIONERS.

ASSIGNMENT OF CLAIM AGAINST A COUNTY — GARNISHMENT. — Where an individual who is working for a county, under a contract, gives to the county clerk thereof an order to deliver all warrants issued by the county commissioners to him to one J., as collateral security for a note attached to the order, the acceptance of such order by the written indorsement thereon of the county clerk perfects the assignment, and places the assignor's claim against the county beyond the reach of garnishment.

Appeal from District Court of La Plata County.

ACTION by A. R. Lewis against the board of county commissioners of San Miguel county to recover money alleged to have been fraudulently transferred by defendant after service of garnishee process. Judgment for defendant, and plaintiff appeals.

Messrs. RUSSELL & McCLOSKEY, for appellant.

Mr. W. H. GABBERT, for appellee.

RICHMOND, C. December 17, 1883, appellant, plaintiff below, obtained a judgment in the county court of La Plata county, Colorado, against A. Mitchell, for the sum of \$1,059.35 and costs. On the same day, in the same court, M. J. McClosky obtained judgment against said Mitchell for the sum of \$260.10, which judgment McClosky assigned to plaintiff.

In these original actions, affidavit and bond in attachment were filed, and copy of attachment writs served upon defendant herein, with a notice that all debts owing by said board of county commissioners of said San Miguel county to Mitchell, and all other personal property in its possession or control belonging to defendant Mitchell, were attached. Interrogatories were submitted to the county clerk of said county, and, in behalf of said board, he answered denying any indebtedness, as well as the custody and control of any property or effects of said

Mitchell, by the said board of county commissioners, or said county of San Miguel. These answers were filed in said causes, and were not traversed, nor was any action taken concerning the discharge of the garnishees.

Plaintiff brings this suit, alleging that the defendant was indebted to Mitchell in certain sums of money; and that county warrants belonging to Mitchell were held by the county at the time of the service of the garnishee process to an amount largely in excess of his demand; and that defendant, after service of process, fraudulently transferred the sum of \$3,219 to the Miners' & Merchants' Bank of Ouray.

Defendant specifically denies the allegations in the complaint, and by a separate defense denies that at the time of the service of the process, or at any time since, the said board, or said county of San Miguel, were or are indebted to Mitchell, or had or have had control of any property or moneys belonging to Mitchell; that said Mitchell had, before service of the process, transferred by an order all warrants coming to him, by virtue of certain contracts made with the board of county commissioners of San Miguel county, to J. M. Jardine, cashier of the Miners' & Merchants' Bank of Ouray. In this same defense they set up the fact that answers were filed to interrogatories submitted in the original proceedings denying any liability or responsibility as garnishees. To this defense a general demurrer was interposed and overruled.

The contention of defendant is that the answers filed in the original cause were final and conclusive, they not having been traversed, and that plaintiff is therefore precluded from maintaining this action. Plaintiff takes the opposite view.

The cause must be affirmed upon its merits; therefore it is not essential that we should determine this question.

It will be observed that the demurrer in this case is general. "The demurrer may be made to the whole

petition, or to the statement of any of the causes of action embodied in it; but, if made to the whole pleading, it will be overruled if any of the statements are held to be good; and if to the first, second and third paragraphs of an answer, or either of them, it is a joint demurrer, and will be overruled if any of the paragraphs are good." Bliss, Code Pl. § 417.

In the defense demurred to defendants distinctly and positively deny that they were at the time of the service of the process, or since that time, in any manner indebted to Mitchell, or that they held or controlled any effects belonging to him. This defense was a perfect defense, and, if established by proof, necessarily defeated the plaintiff's right of recovery; therefore the demurrer was properly overruled.

The record in this case discloses the following facts: That original actions were commenced December 17, 1883; judgments were obtained February 18, 1884; garnishee process was served upon the board of county commissioners of San Miguel county, January 14, 1884. That Mitchell had a contract with said board of county commissioners to transcribe certain county records; and, being in need of money for the purpose of paying help, procured a loan from the Miners' & Merchants' Bank of Ouray county, and on June 4, 1883, for the purpose of securing payment of said loan, gave the following order to Charles F. Painter, county clerk and recorder, San Miguel county, Colorado: "You are hereby directed to deliver to J. M. Jardine, cashier Miners' & Merchants' Bank of Ouray, all warrants issued by the board of county commissioners to me for and on account of transcribing the records of said San Miguel county, to be by said J. M. Jardine, cashier of said bank, held as collateral security for a note of even date hereto attached. [Signed] A. MITCHELL." This order was received by the county clerk on the 7th day of June, 1883, and duly presented to the board of county commissioners, and, for and on

behalf of the board of county commissioners of the county of San Miguel, the county clerk accepted the order by writing across its face as follows: "Accepted this 7th day of June, A. D. 1883. CHAS. F. PAINTER, Clerk and Recorder of San Miguel County, Colorado;" and returned the same to Jardine. That on or about the 1st of February, 1884, Painter, clerk and recorder of said county, at the special instance and request of plaintiffs, A. R. Lewis and M. J. McClosky, made and subscribed answers as garnishees in the causes, and set out this order and acceptance in each answer. In fact, gave an entire history of the transaction. Painter testified that at the time of the service of the garnishment process, and at no time since, has the county of San Miguel, or the board of county commissioners, been indebted to Mitchell, or had or controlled any property belonging to him. He admits that there were some San Miguel county warrants in his possession, as clerk of the board of county commissioners, drawn in the name of Mitchell, but says they were covered by the assignment or order to deliver to Jardine. That the amount of these warrants was \$5,000. Three thousand dollars were delivered upon the order of Jardine to the San Miguel Valley Bank. One warrant, for \$2,000, was canceled. That the total amount paid on account of Mitchell was \$4,719. Five hundred dollars was delivered July 7, 1883; \$1,000 August 23, 1883; and the balance, \$3,219, was delivered February 5, 1884, in San Miguel county warrants. He explains the cancellation of the \$2,000 warrant by stating that that warrant had been issued under a mistake as to amount due Mitchell; that a final settlement was had, and a new warrant in lieu of the \$2,000 was issued for the amount of \$219; that the final settlement between Mitchell and the board of county commissioners was made January 25, 1884.

Certain it is that after giving the order, and it having been accepted by the clerk in behalf of the board of

county commissioners, Mitchell had no further interest or relation with the warrants issued by the county, save and except in the way of an adjustment of the sum due him under his contract; and for any sum of money that he might be expecting to realize from the warrants, he would have to look to Jardine or the bank.

Jardine, undoubtedly, was entitled to receive the warrants from the county under the order, and to hold them as collateral security for the amount of Mitchell's indebtedness to the bank; and had he or the bank been garnished, as he might have been in the original proceeding at the instance of the plaintiff, it is probable he would have intervened and detailed fully the amount of his claim, by way of a lien on the warrants thus delivered to him, and the garnishees would have secured any balance.

The board of county commissioners of San Miguel county cannot be held as garnishees, as the rule undoubtedly is that "the property validly assigned cannot be reached by garnishment, since it no longer belongs to the assignor. * * * The assignee, if summoned as garnishee, may unequivocally answer that he has nothing of the defendant's in his possession." Wapl. Attachm. 209. "Either defendant's property in the hands of a third person, or debts due him by such third person, may be equitably assigned so as to be beyond the reach of garnishment." Id. 211.

The above doctrine, it seems to me, is peculiarly applicable to the transactions here shown by the evidence. The evidence shows that the board of county commissioners was advised of the assignment, and the action taken by their clerk in the premises, at their next regular meeting; and thereupon, for the purpose of aiding Mitchell in procuring funds from Jardine with which to prosecute the work of transcribing the records under the contract with the county, anticipated payment to Mitchell, and ordered a warrant drawn in his favor for \$500,

which warrant was promptly forwarded to Jardine in pursuance of the assignment theretofore given by Mitchell, and accepted by the clerk for the board. In fact, the board appears to have affirmatively indorsed all of the actions taken by their clerk, and therefore his action must be accepted as the action of the board.

It cannot be claimed that Mitchell, in the face of this order, would have a right of action against the county, while the order existed and was in full force and effect; and, certainly, the attaching creditor could acquire no right of action for moneys due Mitchell, when Mitchell himself was not in a position to enforce a similar claim. "If the defendant [in an attachment suit] has authorized the payment of what is due to him to a third person, and the garnishee has agreed so to pay, and the assignee has assented, garnishment by the creditor of the defendant will not hold." *Id.* 212, and cases cited.

I am satisfied that substantial justice has been done by the findings and judgment entered. Judgment should be affirmed.

REED and PATTISON, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed. *Affirmed.*

MR. JUSTICE HAYT not sitting.

HARRINGTON V. SMITH ET AL.

1. ATTACHMENT AND SALE OF EXEMPT PERSONAL PROPERTY.— When a debtor has property of any kind in excess of the quantity covered by the exemption statute, it is his duty to interpose his claim of exemption prior to the sale, if he has notice of the levy and is in position to do so; but when he has only the amount, kinds and value of property covered by the statute, a levy upon and sale thereof is absolutely illegal, unless the exemption be waived. In such case it is the duty of the officer to set aside the exempt property.

14 376
4a 180
4a 181

14 376
10a 480
14 376
14a 474
14a 475

2. **WAIVER OF EXEMPTION RIGHTS.**— Where the debtor was out of the state at the time of the levy, a letter to his creditor asking for a postponement of the case until he could “come down, and fix up everything satisfactory,” but making no claim to exemption, was not a waiver of his exemption rights.

Appeal from District Court of Larimer County.

ACTION by Perry Harrington against John L. Smith and Thomas H. Davy for trespass in seizing exempt property. Plaintiff was nonsuited, and appeals.

MESSRS. HAYNES, DUNNING & ANNIS, for appellant.

MR. T. M. ROBINSON, for appellees.

RICHMOND, C. May 29, 1885, appellant was the head of a family, residing in Larimer county, Colorado, a carpenter by trade, and was the owner of two bay horses, of the value of \$200; one lumber wagon, of the value of \$80; one set of double harness, of the value of \$25; one cow and calf, of the value of \$50,— which he claimed were exempt from levy of attachment and sale under an execution. Smith was constable for that county; and on that day appellee Thomas H. Davy caused a certain writ of attachment to be issued and delivered to said Smith, and directed him to take and seize the above-enumerated property. It appears that at the time of the levy, and even until after the 20th day of June of that year, appellant was temporarily absent from the state. He seeks to recover for the triple value of the property so seized and sold.

On the 30th day of May, 1885, Davy wrote a letter to appellant informing him that he had attached all of his stock — harness and wagon included. To this letter appellant replied, stating that he would return, without fail, by June 20th, and arrange everything satisfactorily, asking for a stay of proceedings until that date. In this letter no claim of exemption was set up, nor was the

claim made by any member of his family. The sale of the property took place subsequent to the 20th of June, 1885 (the time when appellant had agreed to return and arrange matters).

In addition to the above stock seized by the sheriff, it appears that the constable levied upon four other cows and one calf belonging to appellant. There seems to be no dispute about the ownership, nor that the stock levied upon was all that appellant owned at the time, nor of the fact that he was detained, and unable to reach Colorado prior to the sale under the execution.

Motion for a nonsuit was granted, and exceptions noted. Thereafter a motion for a new trial was overruled. In denying the motion for a new trial, the court said that, "where the debtor knew that his proper was attached while it was yet within the control of the officer, so that it could be returned to him, it was his duty to demand its return, or to give notice in some way of his disapproval of the act. But, even if he might be silent and be safe under such circumstances, if he says anything or does anything in respect to the levy upon his property, it must be a disapproval of the officer's act; or else the fact that he does say something, and does not do or say anything to disapprove of the levy, should be construed into an acquiescence." The court formed its conclusion on the letter of June 9, 1885, written by appellant to his creditor, which is in words and figures as follows:

"Tunnel Camp, Wyo., June 9, 1885. Thos. H. Davy, Esq.: Yours of May 30th at hand to-day. In reply I will say that it is impossible for me to come home now, as the high water has washed out the head-gates, and the superintendent has gone to Cheyenne to get instructions from the company. If your letter had reached me one day sooner, I could have made other arrangements; but, as it is, I can't do anything. I wish you would postpone the case until the 20th, and I can come down and fix up everything satisfactory. I won't leave the work until

the superintendent comes home. I may not gain anything, but it is left in my charge. Yours, PERRY HARRINGTON.

"Do the best you can for me, and I will pay you. I will be there on the 20th without fail."

The judge, in the trial, intimated that he based his conclusion upon the principles laid down in *Drake, Attachment*, § 244a. The principle there announced is as follows: "The defendant, if aware of the levy, must at the time claim the exemption, or it will be considered he consents to it. Manifestly, he cannot set up such a claim after judgment rendered against him in the attachment suit." This principle is based upon Indiana authorities, which were undoubtedly influenced by the peculiar wording of the statute of that state, hereinafter referred to. The sole question for our consideration, therefore, is whether or not the conclusions of the court were correct.

This particular question has received no direct consideration in any of the causes involving the question of exemption heretofore heard in this court. The General Statutes of this state (1883, § 32, p. 601) provide as follows: "The following property, when owned by any person being the head of a family, and residing with the same, shall be exempt from levy and sale upon any execution or writ of attachment: * * * Working animals to the value of \$200, one cow and calf;" * * * the "tools and implements or stock in trade of any mechanic, miner or other person, used and kept for the purpose of carrying on his trade or business, not exceeding \$200 in value."

Section 34 of said act provides that "if any officer or other person * * * shall take or seize any of the articles of property hereinbefore exempted from levy and sale, such officer or person shall be liable to the party injured for three times the value of the property illegally taken or seized, to be recovered by action of trespass with

costs of suit." For the purposes of this discussion, the above is all of the statute necessary to be mentioned.

It will be observed that nowhere in this statute referred to is there any language making it incumbent upon the debtor to select or point out which property he claims is exempt. Seemingly, there is great confusion in the authorities and text-writers as to what is the duty of the debtor at the time the officer seeks to levy upon the property, but a careful examination will disclose the fact to be that this confusion is the result of the different wording of the statutes. In Indiana the statute provides that, if any execution debtor shall claim property as exempted by virtue of this act, he shall elect whether he will claim personal or real property, or both, and shall designate the property so claimed. Undoubtedly, the decisions of Indiana are based upon this provision of that statute.

The statute of Illinois also provides that the debtor, under certain circumstances, shall select the property which he claims shall be exempt; and yet, notwithstanding that provision of the statute, it was held in the case of *Cole v. Green*, 21 Ill. 104, that "where a judgment debtor has but sixty dollars' worth of property he need not prove a formal or express selection by him of that property in order to protect it from levy and sale on execution. If a debtor has but sixty dollars' worth of property the statute exempts it from the effect of any judgment, execution or attachment. It is placed beyond the reach of the law, unless by the voluntary act of the owner."

The argument of the court in arriving at this conclusion is to the effect that there can be no selection where there is nothing left,—one may take the whole, but he cannot select the whole; and that the matter of selection, under the statute, could not be made in this particular case. In such case, the statute, by its own office, sets apart the whole property to the use of the debtor, and absolutely exempts it from levy and sale on execution; and to it no judgment, execution or attachment can exist.

So far as the two horses were concerned, in the case at bar, there is no doubt, from the testimony, but what they were all that appellant had. Consequently, it would not be necessary for him to indicate, directly or indirectly, that the property was exempt. It was the duty of the officer, who is supposed to know the property exempt by the statute, to leave such property so exempt with the execution debtor.

In the case of *Howard v. Rugland*, 35 Minn. 388, it was held that, "when an officer assumes to levy an execution upon and sell property which the law thus chooses and selects as exempt, the levy and sale are *per se* illegal, and the officer liable to the debtor without any demand, as is also the execution creditor who participates in the levy and sale."

Where the statute exempts a particular chattel, as a horse or a work-beast, and the debtor has but one, a selection is obviously not required, nor is the debtor required to claim the benefit of the statute. The officer must take notice of the fact that the chattel is exempt; and, where an officer sold a debtor's only horse, under such circumstances, a conviction of misdemeanor under the statute was sustained against him. *State v. Haggard*, 20 Tenn. 390.

In *Gilman v. Williams*, 7 Wis. 287, it was held: "It is not necessary for the judgment debtor to select or point out to the officer such articles of property as are specifically exempt by law from execution."

Upon a careful examination of all the authorities, we are inclined to think, under the statute of this state, that, when an execution debtor has property of a certain kind in excess of the exemption, it becomes his duty to interpose his claim of exemption prior to the sale, provided he is notified of the levy, and in a position to interpose such claim. This seems to be the rule adopted by this court in *Behymer v. Cook*, 5 Colo. 399, and is undoubtedly supported by the majority of authorities of states

with a similar statute. But, where the execution debtor had only a precise number, or property of the exemption value, under the statute, then, and in such case, a levy and sale under an execution is absolutely illegal, and without warrant, unless exemption be waived, and this is a matter of defense. *State v. Haggard, supra*. In such case it is the duty of the officer to set aside such property as is already exempt, under the statute, from levy and sale.

In the particular case at bar the court undertook or did construe the letter above recited as amounting to a waiver of the exemption rights, and granted a nonsuit. This, in our judgment, was error. The party was not present to claim the exemption until after the sale; and, so far as the evidence goes, the explanation of his absence was entirely satisfactory.

In *Haswell v. Parsons*, 15 Cal. 266, it was held: "The absence of the plaintiff * * * when the sale took place was a sufficient excuse for not claiming the exemption at the time." The purport of the letter, as we construe it, was that he desired particularly to have time allowed him in which he might settle the demand of the execution debtor. As has already been said, the levy of the attachment was illegal. The property was absolutely exempt from levy and sale. By the express terms of the statute under which the writ was issued, the office of the process was limited to property "not exempt by law from execution." Gen. St. § 2002.

A judgment against the debtor would create no lien upon this property. The attachment levy was without force or effect. The defendant was a mere trespasser. Under such circumstances, it is clear that the owner of exempt property, either at the time the levy is made or before or after the sale pursuant to the execution, may claim his property, unless his conduct has been such as to make it inequitable for him to assert his title. In this case, it must be assumed that the defendant knew

when he seized the property that it was exempt, and that the seizure was a trespass. The silence of the plaintiff, under the circumstances, therefore, was not alone sufficient. Some of this property was undoubtedly exempt. And the court erred in determining, as a matter of law, that the letter of June 9th was sufficient to defeat a recovery.

For error in granting nonsuit, we think the judgment should be reversed, and the cause remanded for further proceedings.

PATTISON and REED, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is reversed.

Reversed.

BAUR V. BEALL ET AL.

1. **SALE AND DELIVERY OF CHATTELS — STATUTE OF FRAUDS.**— Where a merchant in failing circumstances transfers and delivers to a creditor, in liquidation of his claim, his entire stock in trade and fixtures, and an hour or two afterwards the latter appoints him his agent to sell the stock and close up the business, redelivering to him the possession for that purpose, whereupon the goods are attached at the suit of another creditor of the debtor, a jury is justified in finding that the sale was not accompanied by an immediate delivery and followed by an actual and continued possession, as required by section 14 of the statute of frauds (Gen. St. p. 509).
2. **PARTICIPATION OF COURT IN EXAMINATION OF A PARTY TESTIFYING IN HIS OWN BEHALF.**— Unless it be shown that a party testifying in his own behalf was actually prejudiced by the participation of the court in his direct and cross-examination, such fact cannot be relied on as error.
3. **CONSTABLE'S SALE — ADMISSION OF THE RECORDS AND FILES OF THE JUSTICE'S COURT IN JUSTIFICATION.**— The record of a proceeding in the court of a justice of the peace, which is properly authenticated and proved, is admissible in evidence, in an action against a constable, to show justification by establishing the judgment, and the awarding of the writs under which the constable acted, and under which he justified.

14	383
17	567
14	383
2a	67
14	383
5a	454

Error to District Court of Arapahoe County.

ACTION by Otto P. Baur against John Beall and J. A. Weir to recover a soda fountain and fixtures. General Statutes, page 509, section 14, provides that "every sale made by a vendor of goods and chattels in his possession, or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor or the creditors of the person making such assignment, or subsequent purchasers in good faith; and this presumption shall be conclusive." |

Mr. S. SLESSINGER, for plaintiff in error.

REED, C. An action of replevin to recover one marble soda fountain and appurtenances belonging to the same. One Albert R. Baur, having been engaged in business at Colorado Springs as a confectioner, and being indebted to his brother, plaintiff in error, who resided in Denver, to secure such indebtedness executed a chattel mortgage to plaintiff in error. After having been in business some time, and being unsuccessful, he wrote plaintiff in error, informing him of his want of success; and plaintiff went down. An interview was had, and it was concluded best that A. R. Baur sell his stock and fixtures to plaintiff in error, in payment of his indebtedness, and quit the business. A bill of sale of the entire stock and fixtures was executed and delivered, and the key of the store — a rented building — was delivered to plaintiff, who, it appears, carried it for an hour or two, then returned it to A. R. Baur, whom he made his agent to sell out the stock and fixtures and close up the business, which, according to the evidence, he proceeded to do. The entire thing being sold out, or in some manner disposed of, prior to December 18, 1883, except the articles in controversy in

this suit, they were stored by A. R. Baur in the cellar of the building formerly occupied by him, but then re-rented to another party.

A. R. Baur, being considerably indebted to defendant Weir for the rent of the building where the business had been carried on, Weir commenced suit before a justice of the peace, procured an attachment, and caused it to be levied upon the goods or chattels in suit, obtained judgment, and caused the goods to be sold under an execution. The other defendant, John Beall, was the constable who served the writs and made the sale. The suit was tried to a jury on February 11, 1886, resulting in a verdict for defendants, on which judgment was afterwards entered.

The facts in the case were very simple. There was no great conflict of testimony. The only question to be determined was whether the goods sold were immediately delivered, and there had been an actual and continued change of possession as required by statute. There are several errors assigned that may properly be consolidated into the following, for the purposes of this review: That the court participated to an unwarrantable extent in the examination of the plaintiff on his direct and cross-examination as a witness in his own behalf.

The record does show a great deal of active participation in the questioning, but this can hardly be relied upon as error unless it be shown that plaintiff was actually prejudiced by it. The circumstances may have rendered it necessary upon that trial — of which we have no means of judging — in order to arrive at the facts.

Next, it is assigned for error that the files and records of the proceeding in the court of the justice of the peace were improperly admitted in evidence. It appears that they were properly authenticated and properly proved, and, being so, were clearly admissible in justification, establishing the judgment, and the awarding of the writs

under which the constable acted, and under which he justified.

The other assignments necessary to be noticed were the refusal of the court to instruct the jury as prayed by the plaintiff, and the instruction given to the jury on his own motion. The first instruction prayed by the counsel of plaintiff was correct, and was substantially given in the second paragraph of the charge by the court. The remaining instructions prayed were incorrect, and very properly refused. The charge given to the jury, taken as a whole, fairly states the law, and cannot be considered erroneous.

The principal question was one of fact. It was fairly submitted to the jury, who found that the sale of the chattels in controversy was not accompanied by immediate delivery, and followed by an actual and continued possession, as required by section 14 of the statute of frauds. Gen. St. p. 509. The jury was warranted in so finding from the evidence. The necessity of clear, unequivocal and unmistakable change of possession, and retention of such possession by the vendee, has been properly, fully and clearly asserted by this court. *Cook v. Mann*, 6 Colo. 21; *Wilcox v. Jackson*, 7 Colo. 521; *Herr v. Mercantile Co.* 13 Colo. 406. The judgment should be affirmed.

PATTISON and RICHMOND, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

Affirmed.

14	386
1a	154
1a	338
14	386
20	18

TOWN OF LONGMONT V. PARKER.

HIGHWAYS — ABUTTING OWNERS. — Where a land-owner has no fee in the land occupied as a highway, but his land abuts on it, and he has rights therein not shared in common with the general public for purposes of travel and use, a person using or appropriating such

highway or a portion of it for other and different purposes than the one contemplated, whereby the highway is obstructed and impaired as a means of ingress and egress, is liable to the abutting owner for any consequential damages arising from such appropriation and use depreciating the value of the property.

Appeal from District Court of Boulder County.

ACTION by Edward Parker against the town of Longmont to recover damages for the depreciation of property by the excavation of a ditch in the highway upon which the property abutted. There was a verdict and judgment for plaintiff, and defendant appeals.

Messrs. F. B. SECOR and B. L. CARR, for appellant.

Messrs. KINNE & WOY, for appellee.

REED, C. Parker, the appellee, plaintiff below, claimed to be the owner of a five-acre tract of land near the town of Longmont. Upon the trial no direct proof of ownership of Parker was offered, but no objection was made on account of the kind of proof offered and admitted, and the ownership will be regarded as conceded by appellant on the trial. Plaintiff had a brick house and some other improvements on his land near the west line of the lot, and resided in it. The lot abutted upon the east line of the public highway, sixty feet in width. The house was about twenty-five feet from the line of the road. The defendant was a municipal corporation. In the spring of 1885, some time after the occupation of plaintiff commenced, and after the erection of the house and buildings, the defendant excavated a ditch, for the purpose of supplying the town with water, in the highway in front of the residence of plaintiff, on the west side of the highway; the distance from the line of plaintiff's lot to the bank of the ditch being about forty-nine feet. Directly in front of the premises of plaintiff the ditch, at its greatest width, was from fourteen to seventeen feet, and its depth about six feet or more. Plaintiff's

land abutted upon the highway, no part of which had been his property; the party from whom he acquired title having dedicated the land in the highway to public use previous to the sale of the land to plaintiff.

Plaintiff brought this suit to recover damages to his property by the constructing and maintaining the ditch. It is assigned for error that the court overruled the demurrer to the complaint. On examination, we do not think the grounds of demurrer well taken, or that the court erred in the judgment upon it. It is unnecessary for an understanding of the case that the pleadings be set out in full. It is sufficient to say that the issue presented for trial was whether the plaintiff's property had or had not been damaged by the excavation and existence of the ditch.

The case was tried to a jury. The evidence was conflicting. Several witnesses testified to damage, varying in amount from \$300 to \$500; but their evidence in regard to the manner of arriving at the amount of damage and the elements of damage going to make up the aggregate was quite vague and indefinite. About an equal number of witnesses testified that in their opinion there was no damage. It was in evidence that the earth taken out in excavating the ditch was deposited in the road in front of the premises of plaintiff; a part of it had been removed by the defendant a short distance, and used in grading the road in front of plaintiff's property; and that this left the road higher in places than the adjoining land of plaintiff. The verdict was found for the plaintiff for \$150, and judgment entered upon the verdict.

Considerable latitude was allowed and indulged in in the way of proof upon the trial, and some very remote and novel elements of damage introduced, but no objection appears to have been made or exceptions taken. No exception was taken and no error assigned upon the instructions given. Taken as a whole, they substantially submitted the question of damage, and the law in this

state, as announced in *City of Denver v. Bayer*, 7 Colo. 113, where section 15 of article 2 of the state constitution ("that private property shall not be taken or damaged for public or private use without just compensation") is carefully considered and applied; and where it was held that in a case like the present, where the land-owner had no fee in the land occupied as a highway, but his land abutted upon it, and he had rights therein not shared in common with the general public for purposes of travel and use, a party using or appropriating such highway, or a portion of it, for other and different purposes than the one contemplated, whereby the highway was obstructed and impaired as a means of ingress and egress, would be liable to the abutting land-owner for any consequential damages arising from such appropriation and use depreciating the value of the property. This application of the constitutional prohibition is well sustained by many authorities, particularly by the construction given by the English courts to the "land clauses consolidation act" and "railway clauses consolidation act" of 1845 (8 Vict. chs. 18, 20). In those cases the words used are "*injuriously affected*," which are certainly in meaning and intention the same as the word "damaged" in our constitution. In those cases it has invariably been held that abutting owners, under circumstances like those presented in this case, could recover consequential damages to the extent of the lessened value of the property.

The case of *Beckett v. Railway Co.*, L. R. 3 C. P. 82, was tried before Cockburn, C. J. (1867). In that case the street by an embankment was narrowed from fifty to thirty-three feet opposite the property of the plaintiff, and upon the trial it was left to the jury to say from the evidence "whether there had been any diminution in the value of the plaintiff's house by reason of the constructing of the road in front of it." Upon review, in the opinion of Bovill, C. J., the instruction was held to be correct, and it was said: "Now, the question arises

whether the plaintiff's house in the case was 'injuriously affected,' * * * and whether there is damage sustained by the plaintiff," etc. Here it will be observed that the words "injuriously affected" are treated as synonymous with "damage," the word used in the constitution. Some states, notably Pennsylvania, have given provisions similar to that in our constitution a construction different from that given by this court. The language in section 8, article 16, of the constitution of Pennsylvania, is, "shall make just compensation for property taken, injured or destroyed."

In *Railroad Co. v. Lippincott*, 116 Pa. St. 472, it was held that a depreciation of property, by reason of the construction and operation of a railroad upon the lands of the company, was not an injury for which any damages could be recovered. But for the protection of individual rights, and as being more in harmony with the principles of the common law, we think the construction of this court and those of England better and more consonant with reason.

Under the decisions of this court, the questions for the jury to determine from the evidence were whether the plaintiff suffered damages different in kind from those suffered by the general public, and whether the property of the plaintiff had been lessened in value by the acts of the defendant.

It cannot be said, under the evidence, that the verdict was excessive. It was midway between nothing, as fixed by defendant's witnesses, and \$300, the lowest estimate of witnesses for plaintiff. There having been no serious error in the admission of the testimony or charge by the court, the judgment should be affirmed.

PATTISON, C., concurs. RICHMOND, C., dissents.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

Affirmed.

STATE INS. CO. V. HORNER.

1. CONTRACTS OF INSURANCE — EQUITABLE RELIEF AGAINST FRAUDULENT PRACTICES — CONSTRUCTION OF WORDS AND PHRASES.— Contracts of insurance, like other contracts, are to be interpreted according to the language employed by the parties.
2. But courts of equity will relieve against such contracts where fraud or deception supervenes, and substantial ambiguity therein may be explained as in other cases.
3. The meaning of the phrase "writing the risk," and the items covered by the expression "the expenses of writing the risk," used in a policy of insurance, may be shown by oral evidence; the jury may determine what is meant by and included within each of these expressions; but that body may not pass upon the question whether one embraces the other.
4. While courts have no power to change or modify by construction the expression "the expenses of writing the risk" when thus used, they should require that such expenses be reasonable.
5. Doubtful provisions of insurance policies are to be construed most favorably to the assured.
6. In a provision in a policy that the "insurance may be terminated, at the request of the insured, by repaying the company the customary short rates from the date of this policy, together with the expenses of writing the risk," the "customary short rates" do not include "the expenses of writing the risk."
7. In such a policy "the expenses of writing the risk" includes the commission paid by the company to its agent.

Error to County Court of Arapahoe County.

Messrs. W. J. WEEBER and ROGERS & McCORD, for plaintiff in error.

Messrs. JOHN W. HORNER, *pro se*, and P. L. PALMER, for defendant in error.

CHIEF JUSTICE HELM delivered the opinion of the court.

The insurance policy issued by plaintiff in error to defendant in error contained the following provision: "This insurance may be terminated, at the request of the insured, by repaying the company the customary short rates from the date of this policy, together with

14	391
16	23
16	306
14	391
9a	383
14	391
11a	280

the expenses of writing the risk." Upon the construction of this provision rests the present decision.

Contracts of insurance, like other contracts, are to be interpreted according to the language employed by the parties. Neither the understanding of the insurer or insured, nor custom or usage inconsistent therewith, can be substituted for the provisions of the written policy. *Grace v. Insurance Co.* 109 U. S. 278; *Sperry v. Insurance Co.* 26 Fed. Rep. 234; May, Ins. § 172; Wood, Ins. § 57. It is hardly necessary to add that courts of equity will relieve against such contracts where fraud or deception supervenes, and that substantial ambiguity therein may be explained as in other cases.

The clause above quoted clearly provided that, upon the termination of the policy within the period named therein, the company should be repaid two specific amounts, viz.: *First*, the "customary short rates" from the date of the contract; and *second*, "the expenses of writing the risk." In this respect the provision is too plain to admit of serious controversy. If the expression "the customary short rates" includes the "expenses" referred to, why are those expenses mentioned? Reference thereto is wholly superfluous, and can only serve to mislead. The two expressions may each possess a peculiar technical significance, and testimony may be necessary to explain their meaning; but that they refer to different things, and that the former does not include the latter, and was not intended to do so, are propositions placed by the contracting parties themselves outside the province of construction. The jury may determine upon the evidence produced what is meant by and included within each of these expressions, but we do not consent to the idea that the question whether one embraces the other is a proper subject for their consideration. It may be true that the "customary short rate" itself includes the expenses of writing a correspondingly short risk, when such risk is taken in the first instance; but, if the assured

elects to secure the benefit of a long-time and low-rate policy, and agrees that, in case he invokes the privilege of canceling his contract, he will pay, in addition to the customary short rate, the expenses of writing the long risk, we cannot say that his agreement is so unreasonable or unjust as to warrant his release from performance upon exercising the option in question.

We shall assume, therefore, that the assured, upon cancellation of the policy, was to pay the "expenses of writing the risk," in addition to the "customary short rate." What are "the expenses of writing the risk?" What is the meaning of this expression, as it is generally understood among insurance people? Does it include commissions paid to the agent for procuring the risk? An answer to the third and last of the foregoing interrogatories will be decisive of the present controversy, because it embraces the only item of difference between the parties.

It is contended by defendant in error that the phrase "writing the risk" is synonymous in meaning with the phrase "writing the policy;" that the expense of writing a policy is the one-dollar fee paid the agent for his clerical labor in preparing the instrument; and, therefore, that the one-dollar fee constitutes the entire expenses of writing the risk, and the agent's commission is no part thereof.

The fee of \$1 for writing the policy is always paid to and retained by the agent. The company never receives it, or has anything whatever to do with it; nor does it in any way appear upon the company's books. It is a small item, hardly deserving this prominence in the contract; and, if considered worthy of such careful mention, it is strange that so much indifference was exhibited in the use of language. Why is the fee of \$1 designated "expenses," and why is the word "risk" substituted for the word "policy?" The word "expenses" usually indicates more than one expense or item, and no one capa-

ble of contracting would be excused in law for not knowing that the word "risk" and the word "policy" possess a radically different significance. The company itself could hardly have thought that it was merely providing for the retention of the one-dollar fee paid for writing the policy; a fee of which it took no cognizance, and preserved no record.

But the meaning generally assigned among insurance people to the phrase "writing the risk," and the items covered by the expression "the expenses of writing the risk," are subjects fairly within the domain of oral explanation. Such explanatory testimony was given at the trial by witnesses engaged in the insurance business, and it will now be accepted as controlling. The four insurance agents called by the company agree that the two phrases, "writing the policy" and "writing the risk," do not, in insurance parlance, mean the same thing; and such is the tenor of the same kind of testimony received on behalf of defendant in error. These witnesses, seven in all, unite in declaring that the expense of writing the policy is the fee, usually \$1, for the clerical labor of preparing the contract; but not one of them squarely and consistently asserts that this is the total expense of writing the risk. There is considerable difference of opinion among them as to what items constitute these expenses, but four of them positively assert, and the remainder fairly admit, that the commission paid by the company to its agent is included.

Some of these witnesses stated that they were not familiar with the provision under consideration. It does not seem to be universally incorporated in insurance policies, though its presence is not uncommon. This undoubtedly accounts for some of the discrepancies between the witnesses, and also for some of the seeming inconsistencies in the testimony of the same witness. Upon a retrial of the case most if not all of these discrepancies and inconsistencies will probably disappear; and,

if our conclusion, based upon the testimony now before us, that a repayment to the company of the commission paid its agent was within the purview of the contract, be wrong, such error will doubtless be made to appear.

It may be that, as claimed by defendant in error, the foregoing view will, in individual cases, result in surprise and injury to the assured; but our answer to this assertion, if it rest upon a truthful basis, is, that reasonable examination and inquiry before entering into the contract would avoid such surprise and resulting hardship. Besides, courts have no power, under circumstances like those here presented, to reconstruct contracts solemnly and deliberately made. We do not hesitate, however, to hold that the expenses mentioned in the phrase under discussion must be reasonable. The courts will not permit insurance companies to take advantage of this feature of the contract, and collect unreasonable charges or expenses. But in the case at bar no controversy exists concerning the reasonableness of the commission paid to the agent. Therefore, this particular matter requires no further notice.

We are not unmindful of the rule that doubtful provisions of insurance policies are to be construed most favorably to the assured; but we do not feel at liberty to give this rule a broader application in the present case than is embraced within the foregoing discussion.

The judgment is reversed and the cause remanded for a new trial.

Reversed.

APRIL TERM, 1890.

PEOPLE EX REL. RUCKER V. DISTRICT COURT OF ARAPAHOE COUNTY.

1. WHEN WRIT OF MANDAMUS WILL LIE TO SUBORDINATE COURT, AND EXTENT OF ITS FUNCTIONS.—The writ of *mandamus* may be used to command a subordinate court to proceed to judgment; but when the act to be done is of a judicial or discretionary character, the kind of order or judgment to be rendered cannot be thus controlled or directed. The writ cannot properly usurp the functions of a writ of error, or take the place of an appeal; nor will it lie against a subordinate court unless it be clearly shown that such court has refused to perform some manifest duty.
2. WHEN TWO OR MORE DISTRICT JUDGES MAY ACT TOGETHER.—In this state two or more district judges cannot lawfully sit and act together as a district court except as they sit in bank for the purposes specified in the act of April 2, 1887.

Messrs. C. I. THOMPSON, H. B. JOHNSON, S. D. WALLING and A. W. RUCKER, for petitioner.

Messrs. L. S. DIXON, C. J. HUGHES, Jr., and GEO. J. BOAL, for respondent.

MR. JUSTICE ELLIOTT delivered the opinion of the court.

This is an original application to this court upon petition and notice for a writ of *mandamus* against the district court of Arapahoe county. The cause is submitted upon the petition and answer. There is but little conflict between the allegations of the two pleadings; but to the extent they differ, the averments of the answer, not being controverted, must, for the purposes of this hearing, be taken as true.

The facts necessary to an understanding and determination of this application, as disclosed by the petition and answer, are substantially as follows: The district

court of Arapahoe county has four judges, and holds three terms of court a year, commencing in January, April and September, respectively. The relator, Rucker, as plaintiff, commenced an action in said court against Young and others, as defendants, to enforce the specific performance of an alleged contract in reference to an interest in a certain mining claim in Pitkin county, Colorado, and for other relief. Said cause came on for hearing at the September term, 1889, before Hon. Thomas B. Stuart, one of the judges thereof; and at the same term the court made certain findings of fact, and rendered a certain decree in favor of the plaintiff in said cause, by which it was ordered and adjudged, *inter alia*, that an accounting be had between the parties in said cause; that one A. B. Seaman, Esq., be appointed referee to take the accounting, and also to take testimony, and ascertain a proper description by metes and bounds of that portion of the mine in litigation, and to make report to the court concerning his actings and doings in the premises within ninety days from the date of said decree. The cause was thereupon continued for further proceedings.

Shortly after rendering said decree, and at the same term of the court, the defendants Young *et al.* filed their motion for a new trial. The motion was continued till the succeeding January term of the court, when, the term of office of Judge Stuart having expired, the motion was, by consent of parties, heard before Hon. W. S. Decker and Hon. George W. Allen, two of the judges of said district court. The motion having been submitted, it was afterwards, and at the April term of said court, 1890, ordered by the said Judges Decker and Allen that said decree be set aside and for naught held, and that the cause stand for further proceedings before the court.

Shortly thereafter, at the same term of the court, and before taking any other step in the litigation, plaintiff, Rucker, filed his motion in said cause, asking the court to fix the time when the testimony to be taken before

said referee should be closed and the report made, and to direct the referee to proceed with all due dispatch. This motion was filed upon the theory that the hearing and order for a new trial was a nullity, inasmuch as the statute requires the judges to "sit separately for the trial of causes and the transaction of business."

The motion to expedite the proceedings before the referee, having been heard in said district court before Hon. David B. Graham, one of the judges thereof, was denied. By the petition herein we are now asked to grant a writ of *mandamus* against said district court, commanding it to vacate, set aside and expunge from its records the aforesaid order made by Judges Decker and Allen, granting a new trial in said cause, and commanding said court to fix a time when the testimony shall be closed and report made by the referee as aforesaid.

The grounds upon which a superior court exercises jurisdiction by *mandamus* to control or direct the proceedings of subordinate courts have been so thoroughly elucidated by judicial authority, and are so well understood, as to require no extended discussion. The writ of *mandamus*, in modern practice, takes the place of the ancient writ of *procedendo ad iudicium*, by which a subordinate court was commanded to proceed to judgment, that is, to hear and determine a cause or matter properly brought before it for adjudication; but when the act to be done was of a judicial or discretionary character, the writ was not used to control or direct the kind of order or judgment to be rendered. The writ of *mandamus* cannot properly usurp the functions of a writ of error, or take the place of an appeal; nor will it lie against a subordinate court unless it be clearly shown that such court has refused to perform some manifest duty. *Union Colony v. Elliott*, 5 Colo. 371; High. Extr. Rem. §§ 147-149, 188; Mos. Mand. 19 *et seq.*

Applying the foregoing principles to the circumstances of the present case it is unnecessary to determine the

character of the motion for a new trial filed by the defendants *Young et al.*; for, whether it be the statutory motion, which may be interposed as a matter of right "after trial and decision" in every civil action, as provided by chapter 17 of the code, or whether it be regarded as a petition for rehearing in an equitable action, sometimes allowable in the sound discretion of the court, at an interlocutory stage of the controversy before the final decision thereof, the motion having been interposed in good faith, either party was entitled to have it disposed of, and until disposed of the court is not bound, as a matter of right, to proceed with the litigation by making any order to expedite the consideration of the case by the referee. It follows, therefore, that if the order made by Judges Decker and Allen granting a new trial in the case of *Rucker v. Young et al.* is, as contended by counsel for relator, an absolute nullity, then the motion for a new trial, or petition for a rehearing, remains undisposed of, and plaintiff is not entitled, as we have seen, to proceed with the litigation before the referee. If the order made by the two judges was valid, then the interlocutory decree by which the referee was appointed has been vacated, a rehearing has been granted, and the trial cannot proceed before the referee, but must be recommenced *de novo*. If the order made by the two judges be merely erroneous or irregular, then the remedy must be by some other proceeding than *mandamus*, so that upon whatever theory the application for a writ of *mandamus* in this case is based it cannot be sustained.

Though we might do so, it would hardly be excusable to conclude this opinion without determining which of the foregoing theories is the true one. To leave conclusions thus hypothetically expressed would be to embarrass, rather than aid, the district court by the decision. The question, moreover, is fairly involved in the record, has been ably argued by counsel, and is of much practical importance. Upon due consideration we feel constrained

to say that two or more district judges cannot lawfully sit and act together as a district court, except as they sit in bank for the purposes specified in the act of April 2, 1887. The first section of that act reads as follows:

“In any district court composed of more than one judge, each of said judges shall sit separately for the trial of causes and the transaction of business, and shall have and exercise all the powers and functions, as well in vacation of court as in term time, which he might have and exercise if he were the sole judge of said court.” Sess. Laws 1887, p. 260.

Section 3 of said act provides that the judges may sit in bank for certain specified purposes, and “for no other purpose whatever.” The language of the act, as well as the manifest object of providing additional judges of the same court, leave no room for construction as to the mode in which the judges are required to sit and transact business. In the trial of causes, and in the hearing and determination of any matter of purely judicial cognizance pending in the district court, each judge must sit and act alone. He must exercise all the powers and functions of the court and assume the full responsibility in the decision of each and every cause, demurrer, motion, and the like, coming before him for adjudication, as if he were the sole judge of said court. Two or more judges, by sitting together, cannot share or divide such responsibility. They cannot thus jointly hear and determine, and render a valid and binding judgment or order in any cause. It is not to be inferred from this that every order in a civil action thus made by consent of the parties, and afterwards accepted and acted upon by them without objection, can be repudiated at any subsequent stage of the litigation. Such question is not before us. In this case it appears that, though the parties consented to the hearing of the motion before the two judges, they did not acquiesce in the decision thereof, but promptly repudiated it; and, inasmuch as the record affirmatively

shows that the hearing was had and the decision rendered by the two judges, the order in such form cannot be sustained. It is *coram non judice* upon its face. *State v. Tolle*, 71 Mo. 645; *Duryea v. Traphagen*, 84 N. Y. 652; *Courson v. Browning*, 78 Ill. 209; *Mining Co. v. Howcutt*, 6 Colo. 574.

It follows from the foregoing views that the motion for a new trial in *Rucker v. Young et al.* remains pending and undisposed of, to be hereafter heard and determined by the court in the regular exercise of its jurisdiction, and that the application for a *mandamus* must accordingly be denied.

Application denied.

IN RE BREENE.

1. **CUSTODIAN OF PUBLIC MONIES APPROPRIATING THE INTEREST.**—The receipt, by the legal custodian of public moneys, of interest thereon from banks with which the same is deposited for safe-keeping, is not in and of itself alone an offense at common law.
2. **CONSTITUTIONAL PROVISION FORBIDDING, NOT SELF-EXECUTING.**—The constitutional provision forbidding the making of profit by such officials out of public funds, and classifying the forbidden act as a felony, is not self-executing.
3. **MANDATORY REQUIREMENT CONCERNING TITLES OF BILLS.**—The constitutional inhibition against the passage of bills containing matters not embraced in the title is mandatory; but it should be liberally construed, so as to avert the evils against which it is aimed, and at the same time avoid unnecessarily obstructing legislation.
4. **OBJECT OF CONSTITUTIONAL MANDATE.**—The primary purpose of this constitutional provision is to avoid surprise and fraud upon the legislators and people in the enactment of laws; but a further important end is attained by avoiding surprise to those over whom the laws become operative.
5. **LIMITS OF LEGISLATIVE POWER RESPECTING TITLES OF BILLS.**—The general assembly may within reason make the title of a bill as comprehensive as it chooses; but when it elects to limit the title to a particular subdivision of some general subject the right to em-

14	401
14	417
14	401
17	250
14	401
18	558
14	401
21	49
21	159
22	175
5a	450
14	401
23	75
23	262
14	401
126	390
126	374
14	401
23	440
23	441
14	401
32	313

body in the bill matters pertaining to other subdivisions of such subject is relinquished.

6. **TEST WHETHER SUBJECT-MATTER OF BILL IS CLEARLY INDICATED BY ITS TITLE.**— Nothing unreasonable, however, is required in this respect; and a matter is clearly indicated by the title when it is clearly germane to the subject mentioned therein.
7. **PENAL PROVISION OF REVENUE ACT RELATING TO THE LOANING OR USING OF STATE FUNDS UNCONSTITUTIONAL.**— Under a title providing “for the assessment and collection of revenue” was placed a provision making it a crime for the state treasurer to “loan out or in any manner use for private purposes” the public funds in his hands; *held*, that the penal provision was unconstitutional because not clearly expressed in the title.

Original Proceeding.

PETITION by Peter W. Breene for a writ of *habeas corpus*.

Messrs. S. D. WALLING and C. S. THOMAS, for petitioner.

Messrs. SAM. W. JONES, L. S. DIXON and WELLS, MCNEAL & TAYLOR, for respondents.

CHIEF JUSTICE HELM delivered the opinion of the court.

The right to inquire by *habeas corpus* into the matters presented in this case is not seriously challenged by respondents. Therefore, though counsel for petitioner consider the question at length, jurisdiction in the premises will be assumed without discussion.

The indictment under which petitioner is held in custody charges him with lending public moneys for private gain while occupying the office of state treasurer. He is not accused of otherwise misappropriating or misusing state funds, nor is any deficit or defalcation in connection therewith averred. The accusation is based upon the alleged fact that he received for his private advantage, from the banks mentioned in the indictment, interest upon state funds deposited therein by him while, as

treasurer of state, he was the constitutional custodian thereof.

The act mentioned in the indictment is not an offense at common law. The constitutional provision (sec. 13, art. 10) which forbids the making of profit by public officials out of public funds, and classifies the forbidden act as a felony, is conceded not to be self-executing. Therefore, statutory authority must be found to support the present proceeding against petitioner. If such authority exists, it is embodied in section 2948 of the General Statutes, which reads: "County treasurers shall be liable to a like fine [\$1,000] for loaning out, or in any manner using, for private purposes, state or county funds in their hands, and the state treasurer shall be liable to a fine of not more than ten thousand dollars for a like misdemeanor, to be prosecuted by the attorney-general in the name of the state."

Several serious objections are urged against the validity of the foregoing statute. One of these objections being decisive of the case, the others will not be considered. The title of the act in which the section above quoted appears is "An act to provide for the assessment and collection of revenue, and to repeal certain acts in relation thereto." It is claimed that the subject-matter of the section is not clearly expressed in this title, and therefore that the statute is in conflict with the following section of the constitution:

"No bill except general appropriation bills shall be passed containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed." Sec. 21, art. 5.

Regarding this constitutional provision, we observe — *First*, that it is mandatory. Such is the view expressly declared by this court, and, with but two or three exceptions, adopted elsewhere. *Railroad Co. v. People*, 5 Colo.

40; *Wall v. Garrison*, 11 Colo. 515. *Second*, that it should be liberally and reasonably interpreted, so as to avert the evils against which it is aimed, and at the same time avoid unnecessarily obstructing legislation. *Clare v. People*, 9 Colo. 122; *Dallas v. Redman*, 10 Colo. 297. *Third*, that it embraces two mandates, viz.: one forbidding the union in the same legislative bill of separate and distinct subjects, and the other commanding that the subject treated in the body of the bill shall be clearly expressed in its title. Each of these mandates is designed to obviate flagrant evils connected with the adoption of laws. The former prevents joining in the same act disconnected and incongruous matters. The purpose of the latter is thus tersely and forcibly stated in *Dorsey's Appeal*, 72 Pa. St. 192: "Another purpose was to give information to the members, or others interested, by the title of the bill, of the contemplated legislation; and thereby to prevent the passage of unknown and alien subjects, which might be coiled up in the folds of the bill."

The provision undoubtedly deals with legislative procedure; but obedience thereto directly results in advising the people of the contents of bills that have become laws. It is quite as important to the official or the private citizen that he have the highest facilities for knowing the existing law, as that he have opportunity to offer criticism or suggestion upon pending legislation. He should not be left to discover, "coiled up in the folds" of an act apparently in no way concerning him, a provision affecting his most important interests. For instance, legislation seriously modifying the mechanic's lien or exemption laws should not be hidden under a title relating exclusively to railroads. This, the constitutional provision before us prevents. Therefore, while its primary purpose is to avoid surprise and fraud upon the legislators and people in the enactment of laws, a further important and beneficent end is attained.

Nor is the constitution unreasonable in this respect,

or difficult to comply with. When intelligently and carefully observed, it embarrasses proper legislation but little. The general assembly may, within reason, make the title of a bill as comprehensive as it chooses, and thus cover legislation relating to many minor but associated matters. For example, an act entitled "An act in relation to municipal corporations" may provide for the organization, government, powers, duties, offices and revenues of such corporations, as well as for all other matters pertaining thereto. "The generality of a title," says Judge Cooley, "is therefore no objection to it, so long as it is not made a cover to legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection." Const. Lim. (5th ed.) 174. It is not essential that the title shall specify particularly each and every subdivision of the general subject. Such a requirement would lead to surprising and disastrous results. Many titles would not only be absurdly prolix, but the laws themselves would be endangered by virtue of the inhibition against duplicity of subjects. *Edwards v. Railroad Co.* 13 Colo. 59; *People v. Goddard*, 8 Colo. 432. Efforts to cover specifically in the title all subordinate matters treated of in the act have already jeopardized legislation in this state, and only by the most liberal interpretation has the court been able to save the statutes. *Canal Co. v. Bright*, 8 Colo. 144; *Clare v. People*, *supra*.

But the legislature may, on the other hand, undoubtedly contract the scope of a title to the narrowest limits. When, however, in the exercise of this discretion, it sees fit to thus restrict the title, care must be taken not to transcend, in the body of the bill, the limit thus voluntarily fixed. "An act to amend section 78 of chapter c" must not amend sections of chapter c other than the one named. *People v. Fleming*, 7 Colo. 230. "An act to provide for the payment of county and road taxes in cash," must not authorize the purchase of outstanding

warrants at the lowest price offered, and create a special fund for this purpose. *People v. Hall*, 8 Colo. 485. If the title of a bill be limited to a particular subdivision of a general subject, the right to embody in the bill matters pertaining to the remaining subdivisions of such subject is relinquished. To hold otherwise would be to disobey the constitutional mandate, and invite the grave evils sought to be avoided thereby.

It will not do to say that the general subject of legislation may be gathered from the body of the act, for, to sustain the legislation at all, it must be expressed in the title. Moreover, we are bound to assume that the word "clearly" was not incorporated into the constitutional provision under consideration by mistake. It appears in but few of the corresponding provisions of other state constitutions — a fact that could hardly have been unobserved by the convention. That this word was advisedly used, and was intended to affect the manner of expressing the subject, we cannot doubt. The matter covered by legislation is to be "clearly," not dubiously or obscurely, indicated by the title. Its relation to the subject must not rest upon a merely possible or doubtful inference. The connection must be so obvious as that ingenious reasoning aided by superior rhetoric will not be necessary to reveal it. Such connection should be within the comprehension of the ordinary intellect as well as the trained legal mind. Nothing unreasonable in this respect is required, however; and a matter is clearly indicated by the title when it is *clearly germane* to the subject mentioned therein. Had the corresponding constitutional provision in Wisconsin contained the word "clearly," we doubt if the court would have reached the conclusion expressed in *Mills v. Charleton*, 29 Wis. 400. The supreme court of that state has made, we believe, a broader application of the rule under discussion than it has received elsewhere in the Union.

Let us proceed, in the light of the foregoing sugges-

tions, to consider briefly the legislation before us. Under a title providing "for the assessment and collection of revenue" is placed a provision making it a crime for the state treasurer to "loan out or in any manner use for private purposes" the public funds in his hands. That such uses of state funds should be forbidden will hardly be doubted; and that disobedience of the inhibition should be severely punished is equally beyond question. But the inhibition and the punishment should not be secreted in an act whose title expresses a wholly dissimilar subject. Can it be said that the crime of receiving and retaining interest on public funds, while deposited in responsible banks for safe-keeping, with its punishment of \$10,000 fine (if the statute covers such acts), is clearly germane to the subject of *raising* revenue, either by the assessment and collection of taxes or otherwise?

Had the legislature been content with the title "An act in relation to revenue," the question before us would be relieved of the present embarrassment. Any and all provisions for raising, preserving and disbursing public funds would be germane to the general subject thus expressed. The acts forbidden undoubtedly relate to these funds, and the statute under consideration would, so far as the present objection is concerned, be valid. But that body saw fit, in its wisdom, to limit the bill by its title to one of the subordinate divisions of the above general subject, viz., the "raising" of revenue. The title gives no intimation that the act deals with the custody of public funds after they have reached the treasurer's hands. Proceedings relating to the *preservation* or *disbursement* of taxes are not incidents or concomitants to the *assessment* or *collection* thereof. The words "assessment" and "collection" are used alone. They have a clear and definite meaning, and by their exclusive use the ideas of "custody" and "disbursement" are rejected. With this rejection was necessarily relinquished the power to prescribe in the act regulations or inhibitions incidental

to the control, preservation or disbursement of funds in the treasury. It is a matter of vital importance that revenue, after its collection, be properly preserved and expended. But while regulations looking to these ends are connected with the general subject of revenue, they are not germane to the specific subject of *raising* or *obtaining* revenue.

Again, the proscribed uses of public funds apparently reach all revenue in the treasurer's hands, whether received through the assessment and collection of taxes or from other sources; and the most imaginative mind must fail to trace any connection between the forbidden acts, in so far as they relate to the use of funds accruing from the sale of public lands, payment of fees, and the like, and the subject of assessing and collecting taxes. We say "taxes," because, while the word "revenue" is employed, the act was unquestionably designed to deal alone with revenue obtained by taxation.

Further, the statute in question, together with section 13, article 10, of the constitution above mentioned, was doubtless inspired more by considerations of public policy than the suspicion of danger to the public revenue. The treasurer's bond protects the state from pecuniary loss, and the criminal law provides a punishment for the embezzlement of public moneys. Private speculation with public funds by the official custodians thereof is emphatically *contra bonos mores*. Its inevitable tendency is to corrupt political and official action, and degrade the public service.

The two additional considerations last above mentioned reinforce the view that the legislation in question would not be looked for under a title confined to the assessment and collection of taxes. But few persons, however cautious, would dream of finding concealed in a bill thus christened the legislation in question. We are compelled to hold the act in this respect unconstitutional.

It is considered unnecessary to enter into a critical re-

view or analysis of cases supporting the foregoing conclusions. The following is, however, a partial list of authorities, in addition to the Colorado cases already cited, that are believed to be pertinent: *Ellis v. Hutchinson*, 70 Mich. 154; *State v. Young*, 47 Ind. 150; *People v. Allen*, 42 N. Y. 404; *People v. Commissioners*, 53 Barb. 70; *Dorsey's Appeal*, 72 Pa. St. 192; *City of St. Antonio v. Gould*, 34 Tex. 49; *State v. Barrett*, 27 Kan. 213; *Brown v. State*, 79 Ga. 324; *Durkee v. City of Janesville*, 26 Wis. 697; Cooley, Const. Lim. (5th ed.) 170 *et seq.*; *Nester v. Busch*, 64 Mich. 657; *Thomas v. Collins*, 58 Mich. 64; *N. W. Manuf'g Co. v. Circuit Judge*, 58 Mich. 381; *Smith v. Auditor-General*, 20 Mich. 398; *Igoe v. State*, 14 Ind. 239.

The statute under which petitioner's detention is made, being unconstitutional, the prosecution falls, and he should be set at liberty. It is accordingly so ordered.

Petitioner discharged.

LAW V. NELSON.

1. **TAKING AN APPEAL FROM THE COUNTY TO THE DISTRICT COURT.**—An appeal is not taken from the county to the district court by reason of the fact that it is "prayed and allowed." The appeal bond must be filed and approved before the appeal can be considered "taken,"—that is, perfected; and, if this be not done on the day on which judgment is rendered, the notice in writing must be served or the appeal may be dismissed.
2. **A MOTION TO DISMISS AN APPEAL IS NOT A GENERAL APPEARANCE.** A motion confined to the single object of enforcing a statutory right, though not special in form, cannot be considered a waiver of such right, as by a general appearance for other purposes.

Appeal from District Court of Lake County.

THE section of the statute referred to in the opinion is as follows: "Sec. 4. If the appeal be not taken on the same day on which the judgment is rendered, the appel-

14	409
14	444
14	446
14	450

14	409
16	40
16	470

14	409
17	49

14	409
-1a	111

14	409
5a	86

lant shall serve the appellee, or his attorney of record, within five days after the appeal is taken, with a notice in writing, stating that an appeal has been taken from the judgment therein specified, which notice shall be served by delivering a copy thereof to such appellee or his attorney of record. If the appellant fail to give notice of his appeal when such notice is required, the appellee may, at any time before such notice is actually served, and after the time when it should have been served, have the judgment of the county court affirmed or the appeal dismissed, at his option." Sess. Laws 1885, p. 159.

Mr. D. E. PARKS, for appellant.

MR. JUSTICE ELLIOTT delivered the opinion of the court.

Nelson, who was plaintiff below, brought suit against Law in the county court of Lake county. The case was tried May 13, 1886, resulting in judgment for the sum of \$50 and costs in favor of plaintiff. An appeal was prayed and allowed upon conditions, on the same day, as shown by the record, as follows:

"To which order and judgment, and to the rendering thereof by the court, said parties, and each of them, by their counsel, except and pray an appeal therefrom, each of them, to the district court, which prayers are hereby granted, provided said parties file their appeal bonds herein within ten days from this date, said plaintiff's bond to be in the sum of \$100, and said defendant's as fixed by law; said bonds to be conditioned as required by law."

On May 20, 1886, an appeal bond by the defendant, Law, was filed and approved in the county court. On May 3, 1887, plaintiff's attorney filed a motion in the district court to dismiss the appeal, in the following words: "And now comes the plaintiff, by A. W. Stone, his attorney, and moves the court to dismiss the appeal in

said cause on the ground that no notice, in writing, stating that an appeal had been taken from the judgment rendered in the county court of said county, has ever been served on the plaintiff or his attorney."

The motion was accompanied by the attorney's affidavit to the effect that notice in writing of the appeal had not been served upon him, and that he was informed and believed that no such notice had ever been served upon plaintiff, and that plaintiff was absent from the county. This was the only showing made by either party as to the question of notice. Upon this motion and affidavit the district court dismissed the appeal. To reverse the judgment of dismissal, the defendant brings the cause to this court.

The principal question presented by the assignment of error relates to the construction of section 4 of the act of 1885, page 159, concerning appeals from county to district courts. Since this cause was brought to this court the question has been determined in another case. The construction given by this court may be stated thus: An appeal is not "taken" from the county court to the district court, within the meaning of the act of 1885, by reason of the fact that an appeal to the district court is "prayed and allowed" on the same day on which the judgment is rendered; but the appeal bond must be filed and approved before the appeal can be considered "taken,"—that is, perfected; and, if this be not done on the day on which the judgment is rendered, the notice in writing must be served, or the appeal may be dismissed. *Hunt v. Arkell*, 13 Colo. 543. The case of *Cates v. Mack*, 6 Colo. 401, cited by counsel for appellant, is not in point; and the decision in *Allenspach v. Wagner*, 9 Colo. 127, was based upon a different statute. The case of *Swenson v. Insurance Co.* 4 Colo. 475, supports the decision of *Hunt v. Arkell* as to what is meant by an appeal being "taken."

The contention by counsel for appellant that the appeal as prayed and allowed was joint, and that, therefore, appellee is estopped from saying that he did not have notice thereof, is not tenable. Where there is only one plaintiff and one defendant, a joint appeal by such adverse parties is not, in the nature of things, contemplated by the statute; and the language of the order in this case will not bear such a construction. Notwithstanding its peculiar phraseology, the record shows that each party prayed an appeal, and that a separate appeal was allowed to each on different conditions. It was by no means certain that an appeal would be "taken" by either party simply because each party prayed and obtained an order allowing the same. Therefore, such prayer and allowance did not dispense with the service of the written notice required by the statute.

The claim that the motion of appellee in the district court to dismiss the appeal was a general appearance, and amounted to a waiver of his right to have the appeal dismissed, is not well taken. The motion, though not special in form, was confined to the single purpose of dismissing the appeal. If the motion had been for any other purpose than the enforcement of the right given by the statute, the multitude of cases cited by counsel would be in point; but to hold that appellee waived his statutory right, when he did nothing whatever in the case but insist upon such right, is carrying the doctrine of general and special appearances beyond the limits of modern authorities. The statute says "appellee" may have the appeal dismissed under certain circumstances specified. It does not prescribe the form in which he shall seek such relief. Hence, when he files a motion confined to such single object, supported by affidavit showing the existence of the specified circumstances, in the absence of contrary evidence the relief should be granted. *Crary v. Barber*, 1 Colo. 172; *Smith v. District*

Court, 4 Colo. 235; *Flake v. Carson*, 33 Ill. 518; *Miles v. Goodwin*, 35 Ill. 53; *Blackburn v. Sweet*, 38 Wis. 578.

The judgment of the district court dismissing the appeal was not error, and the same is accordingly affirmed.

Affirmed.

BROOKS ET AL. V. PEOPLE.

1. CONSTITUTIONAL TEST WHETHER A CRIMINAL OFFENSE IS A FELONY OR A MISDEMEANOR.—Whether an offense not capital is to be deemed a felony or a misdemeanor is made to depend, under our constitution, on whether the same is punishable by imprisonment in the penitentiary or in the county jail.
2. WHERE THE STATUTE IS SILENT AS TO THE PLACE OF IMPRISONMENT, IT MUST BE IN COUNTY JAIL — SECTION 2594, GENERAL STATUTES, UNCONSTITUTIONAL.—A person convicted of conspiracy to defraud under General Statutes of 1883, section 811, which does not prescribe the place of imprisonment, was illegally sentenced to confinement in the penitentiary instead of the county jail, since, where criminal statutes admit of two constructions, that is to be preferred which is most favorable to defendant. The provision of General Statutes, section 2594, that where the term of imprisonment exceeds six months the prisoner shall be confined in the penitentiary, is unconstitutional and void, the subject of the act in which it occurs not being clearly expressed in the title thereof as required by article 5, section 21, of the constitution.

14	413
19	139

Error to Criminal Court of Pueblo County.

THE record in this case shows that the plaintiffs in error, B. Herbert Brooks and Sarah J. Brooks, were jointly indicted in the criminal court of Pueblo county for conspiracy to defraud the Washington Life Insurance Company, and that to such indictment they each entered a plea of guilty; that upon such plea the court sentenced the defendants to imprisonment in the state penitentiary for a term of two years each, which sentence they are now undergoing. The errors assigned all go to the jurisdiction of the court, upon such plea of guilty, to sentence to imprisonment in the penitentiary.

Messrs. CHARLES & SMITH, for plaintiffs in error.

MR. S. W. JONES, Attorney-General, and Mr. H. RIDDELL, for the people.

MR. JUSTICE HAYT delivered the opinion of the court.

The statute under which the indictment in this case is framed reads as follows: "If any two or more persons shall conspire or agree, falsely and maliciously, to charge or indict, or cause or procure to be charged or indicted, any person for any criminal offense, or shall agree, conspire or co-operate to do, or to aid in doing, any other unlawful act, each of the persons so offending shall on conviction be fined in any sum not exceeding \$1,000, and imprisoned not less than three months nor exceeding two years." Sec. 811, Gen. St. 1883.

In this state two places are resorted to for the confinement of offenders against the state laws, to wit, the state penitentiary, and the county jail of the proper county. The penitentiary has long been recognized as the proper place for the incarceration of those convicted of the graver offenses only, while the county jails have been utilized for the confinement of those convicted of minor offenses, and confinement in the penitentiary has always been regarded as more severe than confinement in a county jail, on account of the disgrace and reproach attached to confinement in an institution thus set apart as a place for the incarceration of the more depraved and infamous classes of offenders; and under our constitution the test by which to determine whether an offense less than capital shall be deemed a felony or a misdemeanor is made to depend upon whether the same is punishable by imprisonment in the penitentiary or in the county jail. And by statute the consequences resulting from a conviction of a felony are made much more serious than those arising from a conviction of a misdemeanor. Art. 18, § 4, Const.; secs. 943, 944, Gen. St.

The number of peremptory challenges to which a defendant may be entitled in a given case is also made to depend upon whether the charge preferred against him amounts to a felony, or is a misdemeanor only. It will thus be seen that the distinction between the two grades of offenses is important, for many reasons. It will be noticed that the statute upon which this prosecution is based is silent in reference to the place of confinement; and, unless some other act can be found making the offense a felony, it is clear that a conviction will only authorize a confinement in that institution considered the less penal, to wit, the county jail. This is in accordance with a fundamental rule governing the construction of criminal statutes, which requires that, in case the statute admits equally of two constructions, that which is the more favorable to the defendant is to be preferred; and when the statute is silent as to the place of imprisonment, there being county jails for persons convicted of misdemeanors, and a penitentiary for those guilty of higher crimes, the former, rendering the punishment less severe, must be selected. *Horner v. State*, 1 Or. 269; *St. Louis v. Goebel*, 32 Mo. 295; End. Interp. St. 456.

In imposing the sentence in the case at bar, the criminal court, no doubt, had in mind the following provision, to be found in section 2594 of the General Statutes of this state: "All persons who shall hereafter be convicted of any crime under the laws of this state, or have been heretofore convicted under the laws of this state, or of the territory of Colorado, where the punishment is imprisonment for a period of time exceeding six months, shall be imprisoned in the penitentiary; and all courts in which such conviction shall be had shall give judgment accordingly."

An examination of our statutes will show that many offenses may fall within the terms of the above provision; for, while it is undoubtedly true that the place of confinement, whether in the penitentiary or the county

jail, is usually specified in our Criminal Code in connection with the offense, in some instances, where a term of imprisonment exceeding six months may be imposed for crime, the Criminal Code is silent in reference to the place of incarceration. Among other cases in which this silence is noticeable, the following may be mentioned: Section 799, fixing imprisonment for resisting an officer, in certain instances, for a term not exceeding one year; and the same section authorizes like imprisonment for any wanton beating of any person by an officer under color of such officer's commission. Section 854 authorizes a sentence of confinement, for a term not exceeding twelve months, in case of a conviction for procuring liquor for an habitual drunkard, knowing him to be such. Section 866 prohibits the emitting of any bill of credit, or any instrument of writing to be used as a general circulating medium in lieu of money, without a special leave from the legislative assembly, and fixes the punishment for the violation thereof by fine not exceeding \$500, or imprisonment not exceeding one year. Section 898 makes it an offense punishable by a fine of not exceeding \$1,000, or imprisonment not exceeding one year, or both, for any employee of a telegraph company, or any other person, to wilfully divulge the contents of any telegram. By section 910 a fine or imprisonment of not more than one year is provided for disturbing landmark or location stakes. And by section 917 it is provided that, if any person shall maliciously use the name of another, without his authority, in advertising any property or business upon any natural scenery, that he shall, on conviction, be punished by a fine, or imprisonment not to exceed *one year*. If, therefore, the provision in reference to the place of confinement to be found in section 2594 of the General Statutes is in force, it has the effect of raising many offenses to the grade of felonies that would otherwise be held to be misdemeanors, and punished only as such.

We are constrained to hold, however, that the provision quoted from section 2594 was never constitutionally enacted by the legislature. The following is the title to the act in which said section is to be found: "An act to provide for the maintenance, government and police of the penitentiary; also the mode of appointing officers and fixing the salary of the same, and to repeal several acts relating thereto." It requires no argument to show that a provision making certain offenses felonies, punishable by confinement in the penitentiary, that otherwise would be considered and punished as misdemeanors, deals with a subject not "clearly expressed" in the foregoing title, and that such legislation falls within the inhibition of section 21, article 5, of our state constitution, and is therefore void. This constitutional provision has recently received such a full consideration from this court in *Re Breene, ante*, p. 401 (decided at this term), that we shall rest content with quoting the following from the opinion in that case: "The matter covered by legislation is to be *clearly*, not dubiously or obscurely, indicated by the title. Its relation to the subject must not rest upon a merely possible or doubtful inference. The connection must be so obvious as that ingenious reasoning, aided by superior rhetoric, will not be necessary to reveal it. Such connection should be within the comprehension of the ordinary intellect as well as the trained legal mind."

The provision changing the place of confinement of persons convicted of crimes, in certain instances, from the county jail to the state penitentiary, and thereby raising the grade of many offenses from misdemeanors to felonies, is certainly not in any way indicated by the title of the act in which it is found. If it has any relation whatever to the subject, it must be to that portion expressed in the clause, "the maintenance, government and police of the penitentiary;" and, if such connection be supposed, it will be found to rest upon inference so

doubtful in character as to require the most artful reasoning to reveal it to the understanding of the average intellect. We are therefore of the opinion that the constitutionality of the act cannot be maintained. Consequently the authority of the criminal court to sentence the defendants to the state penitentiary must be determined by the terms of section 811, defining indictable conspiracies, without reference to the provisions of said section 2594. By said section 811, authority to fine and imprison persons found guilty of such conspiracies is expressly given, but the act is silent as to the place of confinement. Under such circumstances the court was only authorized to sentence the defendants to confinement in the county jail of the proper county. Therefore the present judgment, requiring the defendants to be confined in the penitentiary, must be reversed.

It is urged in argument that, as the error is in the sentence only, this court has no power, under existing statutes, either to pronounce the proper sentence, or to remand the cause for the purpose of having the correction made by the trial court. We deem it, however, unnecessary to determine these questions in this case.

As the defendant Sarah J. Brooks has recently been pardoned by the executive, no further order in reference to her is necessary. As the defendant B. Herbert Brooks has already served one year in the penitentiary under the judgment of the court below, we think he has been punished sufficiently, and he will therefore be discharged.

Reversed.

CLANTON V. RYAN.

1. **ELECTION CONTEST — CHANGE OF JUDGE AFTER COMMENCEMENT OF TRIAL — TRIAL DE NOVO.**— A county election contest may be tried notwithstanding a change of county judges after the commencement of the trial; but in such case the trial must be *de novo*.
2. **WHEN RECOUNT OF BALLOTS SHOULD BE ORDERED.**— Where the cause of contest alleged is error, mistake, fraud, malconduct or corruption in the counting or declaring the result of an election, a recount of the ballots should be ordered as a matter of course upon request of the complaining party.
3. **THE BALLOTS MAY BE COMPARED WITH THE POLL LISTS.**— Upon the production of evidence tending to show error, mistake, fraud, malconduct or corruption on the part of the election board, or any of its members, in the matter of receiving, numbering, depositing or canvassing the ballots, or other illegal or irregular conduct in respect thereto, an inspection and comparison of the ballots with the poll lists should be allowed, in connection with the oral evidence in reference thereto.
4. **EVIDENCE — MATERIAL AVERMENTS MUST BE PROVEN BY CONTESTOR.**— In a county election contest, the statement of contestor that he is "an elector of the county" is a material averment, and, if denied by the answer, must be proved, or the contest as such must fail; nor is the contestor excused from producing evidence in support of such averment on the ground that other competent evidence is refused.

Appeal from County Court of Lake County.

THE facts necessary to an understanding of the opinion, as disclosed by the record, are as follows: At the general election in 1889, there were three candidates for the office of sheriff of Lake county — Timothy B. Ryan, appellee; Harmon R. Clanton, appellant; and Willis A. Loomis. The result, as certified by the county board of commissioners, showed that Ryan had a plurality of one hundred and ninety-three votes over Clanton, the next highest competitor. Thereupon Clanton instituted proceedings against Ryan pursuant to the act of April 10, 1885. Sess. Laws, 193.

The statement of contest, filed pursuant to section 14

14	419
1a	457
6a	293
14	419
23	392
14	419
10a	413
10a	420

of said act, contains, among other things, allegations to the effect that contestor was at the date of the election, and still is, an elector of said Lake county; that there were errors, mistakes, fraud and corruption in the count and return of the votes from certain precincts of the county, and that such errors and mistakes thus fraudulently made were sufficient to change the result of the election, whereby the will of the electors was annulled and defeated, and the contestor deprived of the office to which, but for the errors, mistakes and fraud aforesaid, he would have been declared lawfully elected.

The answer denies the alleged errors, mistakes, fraud and corruption in the count and return of the votes, and also denies that contestor was at the date of the election, or at any time since said date, an elector of said county.

The issues being settled, the contest came on to be tried before Hon. George S. Phelps, county judge; the trial commencing on December 26, 1889. A large amount of testimony was introduced in behalf of the contestor, including the testimony of nearly one hundred witnesses, and the examination of a large number of ballots which were alleged to have been fraudulently counted and returned. This evidence tended to show many gross errors, mistakes and frauds in the count and return of the votes, and other misconduct of some of the election officers, as alleged in said statement.

Pending the trial, January 13, 1890, the term of office of the presiding judge expired; and thereafter, the case being called for trial before Hon. William R. Hall, the new county judge, it was objected by counsel for contestee that the trial, having been commenced before one judge, could not be proceeded with before another. The court, however, ruled that the contest might still be tried, but that the trial must be *de novo*. Counsel for contestor objected and excepted to this ruling, and also to the refusal of the court to consider the testimony taken before the former judge; such testimony having been

“taken in full, and filed in said cause,” as required by the statute.

Counsel for contestor then offered the ballots which had been cast in certain precincts as primary evidence to contradict and dispute the return and certificate of the judges of such precincts, and to support the particular and specific allegations of the statement that the election judges, by malconduct, fraud and corruption, had erroneously counted votes in favor of contestee which had really been cast for contestor. Objection to this offer was sustained on the ground that there had been no proof that would warrant the court in opening the ballot-boxes; the court holding, however, that contestant would be permitted to offer any legitimate proof of the fraud and corruption as charged. Counsel for contestant reserved exceptions; and, the case being decided in favor of contestee, this appeal is brought. The section of the act of 1885 (Sess. Laws, 198), specially considered in the opinion, reads as follows:

“Sec. 17. Immediately after the joining of issue as aforesaid, the county judge shall fix a day for the trial to commence, not more than twenty nor less than ten, days after the joining of issue as aforesaid, and such trial shall take precedence of all other business in said court. The testimony may be oral, or by depositions taken before any officer authorized to take depositions. Any depositions taken to be used upon the trial of such contest may be taken upon four days’ notice thereof. The county judge trying such cause shall cause the testimony to be taken in full and filed in said cause. The trial of such causes shall be conducted according to the rules and practice of the county court in other cases. An appeal from the judgment and final determination in any cause may be taken to the supreme court the same as in other causes tried in said court: provided, that such appeal be prayed for, bill of exceptions settled, bond for costs executed and filed, and the record transmitted to the clerk

of the supreme court, within twenty days from the date of entering such judgment. The supreme court shall advance such cause to the head of the calendar and hear and determine the same with all reasonable dispatch."

Messrs. A. S. WESTON, S. J. HANNA, GEO. GOLDTHWAITE and GEO. R. ELDER, for appellant.

Mr. A. T. GUNNELL, for appellee.

MR. JUSTICE ELLIOTT delivered the opinion of the court.

No extended argument is necessary to demonstrate that it was the design of the framers of our constitution that laws should be enacted whereby contested election cases might be thoroughly tried, and impartially and speedily determined. In a republic the people are sovereign, and their sovereignty is primarily expressed in the choice of those who are to exercise governmental powers. In monarchical governments it is regarded as one of the highest crimes to attempt to overthrow the authority of the reigning prince: As citizens of a free republic, we should at least be as loyal to our country and its institutions as the subjects of a monarchy are to theirs, and should regard any attempt to defeat the will of the sovereign people in the lawful exercise of the elective franchise as the highest crime against the state or nation. In the light of these fundamental truths, the obligation of every department of the government, and the duty of all good citizens, become clearly apparent. Stringent laws should be carefully enacted to secure fairness and prevent fraud in the conduct of elections; and such legislation should be liberally construed and rigidly enforced. Upon the faithful discharge of these duties and obligations depends the stability and perpetuity of our free institutions.

By the act of 1885 (Sess. Laws, 193) it is provided that contested election cases of county officers, except county judges, shall be tried by the county judge or county court

of the proper county. The issues are required to be speedily made up, and the trial to be fixed for an early day; and in case of appeal the cause is to be taken direct to the supreme court, where it has precedence over ordinary cases.

Though we shall not undertake to notice all the assignments of error presented, yet, as certain questions of paramount public concern, and of great practical importance in the trial of election contests, are involved in the record, and have been fully argued by counsel, we shall endeavor to give them due consideration.

In our opinion Judge Hall was right in ruling that a trial of the contest might be had upon his accession to the bench, notwithstanding the term of Judge Phelps had expired after the trial had commenced. Elections for county judges take place once in three years, but it is only once in six years that such elections occur simultaneously with the general election of county officers. While county election contests, if promptly proceeded with, may be concluded before the date when newly-elected county officers are required to qualify, yet we see no reason to suppose that the law relating to the trial of such contests was framed specially with reference to that event; and, if such trials are not then concluded, there seems to be no reason why they should not be finished or retried afterwards. Public policy undoubtedly requires that election contests shall be tried as speedily as the rights of the parties and the orderly administration of justice will permit. Every citizen is, or should be, interested in having such contests determined according to the real choice of the lawful electors, as expressed at the polls, without regard to his individual preference.

Section 17 of the act of 1885, *supra*, provides that "the county judge trying such cause shall cause the testimony to be taken in full and filed in said cause." From this language it is argued with much force that the new judge should have taken up the trial where the retiring judge

left it, and should have considered the evidence taken by his predecessor as substantive evidence in the cause. In view of the hardships resulting from mistrials which are liable to occur in cases of this kind, especially where a change of county judges follows a general election of county officers, we might be inclined to hold that such was the purpose and intent of requiring the testimony to be thus preserved, were it not that the very next sentence of the act requires that "the trial of such causes shall be conducted according to the rules and practice of the county court in other cases." By the words "other cases" must be understood ordinary civil actions. It certainly is not "according to the rules and practice" in the trial of ordinary civil actions before a court of record for one judge to hear the evidence, or a part thereof, orally, and then for another judge to render a finding and judgment upon such evidence, however perfectly the same may have been preserved. It is more probable that the object of requiring the testimony to be preserved was for convenient reference afterwards, or for use on appeal, or as a deposition in case a second trial should be had when witnesses should have died or removed from the county.

From the allegations of the statement in this case, it appears that the contestant undertook to show that certain ballots cast by legal voters were either falsely counted, and so made the basis of a false return, or that they were surreptitiously changed or destroyed by some of the election officers, and other and different ballots substituted in their stead. To sustain these allegations, oral testimony, in connection with the ballots and the poll-lists, was competent evidence to be introduced at the trial. When the ballots and poll-lists are produced from the possession of the proper custodian, it is presumed, *prima facie*, that a ballot bearing the number opposite the name of an elector on the poll-list shows how such elector voted. When it is attempted to over-

throw this *prima facie* presumption by oral evidence, it is important that the trial judge should have an opportunity to hear and see the living witnesses, if they can be produced, in order that he may the better pass upon their credibility and the weight of their evidence.

Under the causes of contest set forth in the sworn statement of the contestor, a recount of the ballots in the precinct where error, mistake, fraud, malconduct or corruption was charged should have been ordered as a matter of course upon request of the complaining party. A mere recount does not involve any exposure of the secrecy of the ballot.

Upon the production of evidence tending to show error, mistake, fraud, malconduct or corruption on the part of the election board, or any of its members, as charged, in the matter of receiving, numbering, depositing or canvassing the ballots, or other illegal or irregular conduct in respect thereto, an inspection and comparison of the ballots with the poll-lists should also have been allowed, in connection with the oral evidence in reference thereto. The secrecy of the ballot is not so important as its purity; and when, in a proper proceeding, there is evidence tending to show that the ballots of electors have been changed, tampered with or destroyed, either by mistake or by the fraudulent conduct of any member or members of the election board of any precinct, or any other person or persons, it is the right of the public, and of the electors themselves, as well as the candidates, to have such matters thoroughly investigated; and courts of justice, under such circumstances, should be swift and fearless to assist in all lawful and proper ways to ascertain the truth in respect to such charges, and to rectify as far as possible any and all wrongs, whether of mistake, negligence or crime, which may be proved to have been committed against the elective franchise.

In an election contest proceeding such as this, the averment in the statement of contestor that he is "an elector

of the county" is a material averment (Act 1885, p. 197, § 14); and if denied by the answer, as in this case, it must be proved, or the contest as such must fail. Nor can the contestor, on appeal to this court, excuse the non-production of evidence in support of such averment, on the ground that competent evidence in support of other averments was offered and refused on the trial. The contestor having rested his cause in the court below without offering any evidence that he was an elector of the county, the contest was rightly dismissed, and the judgment is accordingly affirmed.

Affirmed.

McKENZIE v. BALLARD.

1. BILL OF EXCEPTIONS — STIPULATIONS OF COUNSEL NOT EQUIVALENT THERETO.— The supreme court cannot review the evidence unless the same is incorporated into the record. The stipulation of counsel that the testimony as taken by the court stenographer shall be the record in the case does not supply the place of a bill of exceptions duly authenticated and certified.
2. IRRIGATING DITCHES — INEFFECTUAL ORDER TO BUILD "SLUICES" ON DISSOLVING INJUNCTION AGAINST THE CONSTRUCTION OF A DITCH.— A plaintiff had obtained an injunction restraining defendant from constructing an irrigating ditch through the land of the former. On final hearing the injunction was dissolved and the cause dismissed. There was nothing in the pleadings about sluices. *Held*, that an order of court requiring defendant to build sluices for irrigating water wherever necessary was ineffectual for any purpose on account of its uncertainty.

Appeal from District Court of Pitkin County.

Mr. D. H. WAITE, for appellant.

Mr. PORTER PLUMB, for appellee.

MR. JUSTICE ELLIOTT delivered the opinion of the court.

The appellant McKenzie was plaintiff below. He brought suit in the district court against the appellee,

14	496
16	459
14	426
33	27

Ballard, as defendant, alleging in his complaint that defendant unlawfully, without the consent, and contrary to the command, of plaintiff, was engaged in digging and cutting a ditch through plaintiff's land without condemnation proceedings, and without having obtained the right of way therefor. The prayer of the complaint was that defendant might be enjoined from the construction of the ditch. A temporary injunction was granted.

The defendant answered, admitting the plaintiff's possession of the land described in the complaint, except as to portions covered by defendant's ditch; denied certain allegations of the complaint; and, for a further defense, averred that defendant was the owner of lands adjoining said lands of plaintiff; that defendant's lands required irrigation, and that said ditch was being constructed for such irrigation purposes; that for a valuable consideration plaintiff had agreed that defendant might construct such ditch for such purposes across the lands of plaintiff where it might be convenient to carry water to defendant's lands; and that, in pursuance of such agreement, defendant was constructing the ditch as aforesaid, and had expended a large sum of money in and about said work, without objection from plaintiff, prior to the commencement of this action and the obtaining of the injunction. Defendant prayed for the dismissal of the cause, for his costs, and for such other and further relief as to the court should seem proper.

The case was tried before the court without a jury. After hearing evidence on both sides, the court, upon the issues joined, found in favor of defendant, dissolved the temporary injunction, and rendered judgment in favor of defendant for costs. The record of the judgment concludes as follows: "And it is further ordered that the defendant herein be required to build sluices for irrigating water wherever necessary."

The plaintiff brings this appeal, and assigns for error that the finding of the court was against the law and

the evidence, and especially that the order of the court in reference to building sluices is erroneous.

The court cannot review the evidence, for the reason that the same is not incorporated into the record. The stipulation of counsel that "the complaint, affidavits, demurrer, motions and answer, together with the testimony as taken by the court stenographer, shall be the record in the case," does not supply the place of a bill of exceptions duly authenticated and certified. This has been repeatedly decided by this court. *Molandin v. Railroad Co.* 3 Colo. 173; *City of Denver v. Capelli*, id. 235; *Ross v. Duggan*, 5 Colo. 85.

Appellant complains, with much reason, of the order of the court requiring defendant "to build sluices for irrigating water wherever necessary." There is nothing in the complaint relating to sluices. The answer contains nothing in reference to them, and asks for no affirmative relief, except it be by the prayer for general relief. The following passage from appellant's brief in regard to the order about necessary sluices is certainly quite pertinent:

"How many are there to be? Where are they to be? When are they to be constructed? Who is to be the judge of the necessity, number, location, size and time of construction, whether plaintiff or defendant, remains undetermined; and, in these respects, a court of equity, assuming to settle a controversy between the parties, leaves plaintiff entirely at defendant's mercy."

In form, the order of the court in relation to sluices would seem to be a burden imposed upon the defendant, Ballard; in effect, it is liable to be construed as a license to defendant to build sluices whenever and wherever he chooses. Considering the circumstances of the case as they appear from the record before us, we feel constrained to declare the order of the court in relation to sluices to be ineffectual for any purpose on account of its uncertainty, and that it shall not prejudice or affect the

rights of the parties in any manner as an adjudication. In other respects the judgment of the district court will be affirmed; but appellant shall recover his costs in this court against appellee.

Decree modified.

SMITH V. GRIFFIN ET AL.

14	429
27	46

1. WHAT IS NECESSARY TO CREATE AN EASEMENT IN STREETS AND ALLEYS.— Where the owner of a block in a city divides it into lots, with an alley in the rear, but files no plat, as required by the statutes in the case of a dedication, and the city does not accept the new arrangement, the purchaser of the alley-way at a sale for taxes takes it free from easement, and may close it.
2. WHO NOT ENTITLED TO A WAY OF NECESSITY.— The purchaser of a city lot seventy-five feet deep, with a frontage of twenty-five feet on a street, is not entitled to a way by necessity to the rear of his lot over the adjacent land of his grantor.
3. CLERICAL ERRORS MAY BE CORRECTED.— A mere clerical mistake in preparing a tax deed may be corrected.

Appeal from Superior Court of Denver.

Mr. W. S. DECKER, for appellant.

Messrs. MARKHAM & DILLON and E. A. CLARK, for appellees.

CHIEF JUSTICE HELM delivered the opinion of the court.

Appellant Smith and one Campau, being the owners of a certain portion of block 64, in the west division of the city of Denver, divided the same into seven lots. Five of these lots fronted on Champa street, the remaining two on Eighth street. No plat was filed, however, as provided by statute, and no acceptance of the new arrangement took place by the city. Upon the front of each of the five lots first mentioned they constructed a dwelling-house, and upon the rear a coal-house and ash-

pit. For convenience in reaching these coal-houses and ash-pits, they left an alley-way nine and eighty-two one-hundredths feet in width, extending from Eighth street to the main alley running through the center of the block.

Four of the five lots abutting on Champa street were disposed of. The remaining lot was retained and occupied by appellant. Subsequently the alley-way in question was assessed and sold for taxes. Defendant Lillian Griffin, who in the meantime had purchased the lot adjacent thereto, fronting on Eighth street and extending back to the main alley, became the owner at such tax sale. No redemption having taken place, in due time she received her tax deed, whereupon she closed the private alley by extending a fence across each end.

Appellant brought the present suit upon the ground that the closing of the alley constituted a nuisance which he was entitled to have abated. The court below rendered a decree in favor of appellee. From this decree the present appeal was taken.

Since Smith and Campau neither made a statutory dedication to the city for public purposes of the strip of land in question, nor conveyed the same by deed, the title remained in them; and, although used as a private way, it continued liable to taxation. The title passed to Mrs. Griffin under her tax deed; and, unless subject to an easement, she acquired the right to fence and use it in accordance with the dictates of her private interest.

The attitude of Smith, being that of an original owner, and not a purchaser after the subdivision, should be borne in mind. If he and Campau were attempting to close this private alley, and one of their grantees was objecting, a different case would be presented. Having subdivided the ground, reserving the alley, and having sold lots with reference to this subdivision, they might be estopped from afterwards interfering with the use of the alley by their vendees; or, if they had wholly sev-

ered their title to the entire premises, including the alley, by deeds specifically recognizing this right as an easement, their grantees might be estopped from interfering therewith. But Mrs. Griffin's title is not thus embarrassed. Her ownership is not in privity with Smith and Campau. She claims through a sale for taxes, and is not estopped as they or their grantees might be in the cases supposed. These considerations show the inapplicability of the authorities upon which appellant relies. None of the cases cited are parallel, either in facts or in principle, with the one at bar. It is hardly necessary to observe that the public neither possess nor seek to assert a right of user in the premises, and hence are not interested in the present controversy.

There being no easement by express grant, and no right existing by estoppel *in pais*, the claim of appellant to the easement in question must rest upon prescription or necessity. It cannot be argued that he has a prescriptive right entitled to recognition in law, as such a right must be founded upon at least twenty years of private use. Our inquiry is therefore narrowed to the question, Has he a way of necessity?

We do not stop to ascertain whether this doctrine could in any event be invoked where title to the servient estate has been, as in the present case, involuntarily parted with by the claimant of the easement. Appellant's lot, which is seventy-five feet in depth, has an unobstructed frontage of twenty-five feet upon Champa, a public street. By this means access may be had to all parts of his premises. It is true the word "necessity," as used in this connection, has been held not to mean that there must exist an absolute physical impossibility of otherwise reaching the alleged dominant estate. When a way exists, but the expenses to be incurred in utilizing it are grossly in excess of the total value of the estate itself, an easement of necessity is sometimes recognized, as, for instance (to use the illustration employed in *Pettingill v.*

Porter, 8 Allen, 6, cited by appellant), where the value of the property conveyed is \$1,000, the vendee might have a right of way over an adjoining tract, owned by his grantor, even though he might, at an expense of \$100,000, reach his premises by some other means. But it is needless to prolong discussion upon this subject. The pleadings and evidence show that the grievance of plaintiff is based upon inconvenience rather than necessity. There is, therefore, no room for the application of the doctrine in question.

It appears that the tax deed, as given to appellee, was defective in omitting the date of the tax sale. Subsequently, appellee procured the execution of a new tax deed, curing the defect in question. Both deeds were received in evidence at the trial. No claim is made of non-compliance with law, or of bad faith or error in advertising and conducting the sale; and, where a mere clerical mistake has occurred in preparing the deed, the purchaser has a right to have it corrected. This is especially true when, as in the present case, no prejudice is shown to have arisen from the mistake.

The description of the strip of land in question employed by the assessor, and included in the advertisement of the tax sale and in the tax deed, differs somewhat from that given thereto by the original owners. Upon this ground it is claimed that the deed is void. Ample proof was received showing that this description is in accordance with custom and usage in describing tracts in that portion of the city of Denver. Besides, it cannot be claimed that the description is not sufficient to fully identify the property. It could hardly have deceived or misled the owner; and, merely because it is not accurate with reference to the cardinal points of the compass, it should not be held so defective as to vitiate the sale.

The judgment of the superior court is affirmed.

Affirmed.

BACHMAN V. O'REILLY.

1. ACTION BY AN ATTORNEY FOR COMPENSATION FOR LEGAL SERVICES — PLEADINGS AND EVIDENCE.— In an action by an attorney for his fee, where no issue is raised by the pleadings on the point of plaintiff's right to practice law, evidence that he was not licensed to practice in the state at the time the services were rendered is inadmissible.
2. HOW THE VALUE OF AN ATTORNEY'S SERVICES MAY BE PROVEN.— Evidence by attorneys in good standing and in active practice is admissible to prove the value of the services.

Appeal from District Court of Arapahoe County.

Messrs. P. L. PALMER, J. W. MILLS and GEORGE SIMMONDS, for appellant.

Mr. H. B. O'REILLY, in *pro per*.

MR. JUSTICE HAYT delivered the opinion of the court.

At the March, 1884, term of the district court of Elbert county, appellant, Frederick Bachman, was convicted of the crime of grand larceny, and sentenced to confinement in the state penitentiary. Bachman thereupon sued out a writ of error for the purpose of having the proceedings of the trial court reviewed by this court. To prosecute said writ of error appellant employed appellee in his professional capacity as an attorney. Appellee, in pursuance of such employment, prepared and filed in this court a motion supported by affidavits, and procured the advancement of the case upon the docket here. Thereafter he prosecuted the case to final determination. As a result of the proceeding, the judgment of the court below was reversed by this court. See *Bachman v. People*, 8 Colo. 472.

The present action grew out of a disagreement between appellant and appellee in reference to the latter's compensation for services rendered in prosecuting said writ of error; the claim of appellee being that, when he was first

retained in said cause, it was distinctly understood and agreed by and between appellee and appellant that for the former's professional services in said cause he was to receive and be paid a retainer of \$250, which was to be in full compensation, unless successful in this court, in which event he was to receive such other and further compensation as his services should be reasonably worth, and that the services were reasonably worth the sum of \$5,000.

Appellant claims, on the contrary, that it was distinctly understood and agreed between the parties that the said sum of \$250 was to be in full for all services in the cause, including a retrial of the case in the district court, should such retrial become necessary, in the event of a reversal of the judgment of conviction by the appellate court.

It is conceded that \$250 was in fact paid by appellant to appellee about the time the latter was employed in the case; and it is further conceded that, in addition to this payment, appellee had at different times, between the date of his employment and the bringing of the present suit, received divers sums of money from appellant, amounting in the aggregate to something over \$200. Appellant claims that this money was loaned appellee, and asks for judgment against him for the same, while appellee claims that a part was advanced for the necessary expenses incurred in prosecuting the writ of error; the balance to be applied in payment *pro tanto* for his services.

The trial resulted in a verdict for appellee in the sum of \$2,000. A motion for a new trial having been filed and overruled, the court rendered judgment upon the verdict. Appellant, having duly reserved his exceptions at the trial, brings the case here for review.

Upon the trial the court refused to permit appellant to introduce evidence tending to show that appellee had not been regularly licensed to practice law in this state until after a part of the services for which appellant sought

compensation had been rendered, and the action of the court in rejecting such evidence is made the basis of the first assignment of error to which our attention is called by counsel. Under our statute, an unlicensed person is prohibited from practicing law in the courts of record of this state in any case in which he is not concerned as a party, and if such an unauthorized person renders service to another, in violation of the statute, he will not be permitted to recover any compensation therefor. *Hittson v. Browne*, 3 Colo. 304. This being the law, the testimony offered should have been admitted, unless appellant was precluded by the pleadings from raising the issue thus sought to be raised. Turning to the pleadings, we find it alleged in the complaint "that on or about October 1, 1884, plaintiff was retained by defendant as his attorney and counselor at law, in his behalf to prosecute," etc. The defendant in his answer "admits * * * that about October 1, 1884, in a certain case before the supreme court of Colorado, on a writ of error to the district court of Elbert county, * * * he employed plaintiff as his attorney at law in said case." Again he avers that "at Denver, on or about October 1, 1884, he employed the plaintiff as his attorney at law to prosecute," etc.; and also alleges "that thereupon said plaintiff entered upon said services, acting as such attorney at law as aforesaid."

No issue upon the legal qualifications of the plaintiff to act as an attorney and counselor at law having been raised by the pleadings, the trial court properly excluded the evidence. When the objection to the admission of this evidence was first made in the court below, defendant, upon a proper showing, might have been allowed to amend his answer, so as to permit the introduction of the testimony; but, no application to amend having been made, he is not now in a position to complain of the ruling excluding the evidence. *Weeks*, Attys. 562; *Pom. Rem.* § 708.

Upon the trial the witnesses Yonley, Markham, Harman, Bentley and Felker were each permitted to testify, against objection, concerning the value of the services rendered by plaintiff, and this is assigned for error. The objection made to the introduction of the testimony in each instance was based upon the claim that the competency of the witnesses to form an opinion as to the value of the services was not shown. Counsel in argument say: "No gentlemen of the Denver bar are better known as able attorneys than these; but, from a perusal of the evidence of each of them, it will be discovered that none of them had had any experience in criminal practice in this state." An examination of the record shows that the latter statement of counsel is not sustained by the evidence; on the contrary, it discloses that nearly all of said attorneys had more or less experience in the criminal practice in this state, while at least one of them (Judge Markham) had, as district attorney for a number of years in the most populous judicial district in the state, an experience in the criminal practice that falls to the lot of but few attorneys. It was not necessary, however, to render the opinion of the witnesses competent to show that they had had any particular experience in the criminal practice; the fact that the witnesses were attorneys in good standing, and engaged in the active practice of their profession, was sufficient to entitle their opinions to be given in evidence. The weight to be given to such opinions was for the jury to determine, and, as an aid to such determination, it was proper for them to be informed as to the experience or lack of experience in the criminal practice of those giving such opinions, but the admissibility of the evidence was in no manner dependent upon such matters. *Lawson*, Exp. Ev. 12, 61; *Allis v. Day*, 14 Minn. 516 (Gil. 388); *University v. Parkinson*, 14 Kan. 160; *Halaska v. Cotzhausen*, 52 Wis. 624; *Harnett v. Garvey*, 66 N. Y. 641.

What we have already said in support of the ruling re-

jecting evidence of the disqualification of O'Reilly to act as an attorney applies also to the refusal of the court to instruct the jury, at appellant's request, that, to entitle the plaintiff to recover in this action, they must find from the evidence that he had been admitted to the bar of the state, and was a member of the bar of the state of Colorado, at the time he performed the services for the value of which he was seeking to recover, the plaintiff's right to practice law not being in issue under the pleadings.

In reference to the amount and value of the services rendered, plaintiff testified that he had been engaged in the active practice of law since 1869 to the time of the trial; that he spent nearly a month in making an examination of the record in the case; that he examined every adjudication of this court bearing on the case, or the law of the case, to see if it were possible to discover some legal determination favorable to Bachman; that he examined the digests and text-books for adjudications in every state and territory, the United States digests, the American Decisions and American Reports, the criminal reports and text-books; that he went twice to Kiowa, in Elbert county, to familiarize himself with the location where the crime was alleged to have been committed. In addition to this labor, the witness stated that upon every question of fact he had conferences with Bachman, lasting oftentimes all day and far into the night; that he procured an order advancing the case upon the docket of this court, upon motion supported by affidavits, and finally made an oral argument in the supreme court to supplement his printed brief. The witness also testified that, owing to certain idiosyncrasies of his client, his labors were very much increased. That he had devoted his life to the legal profession, and nothing else, and that he gave to Bachman's case nearly one solid year of hard work; and as a result succeeded in securing the reversal of the judgment and verdict against his client, upon the evidence. The weight to be given to

this and other testimony in the case was a question for the jury to determine.

This case appears to have been carefully tried by the court below upon the issues made, and submitted to the jury under proper instructions. If the jury had accepted the defendant's theory of the contract, a verdict in his favor would, without doubt, have been returned by the jury; but, the jury having accepted the version of the contract given by plaintiff and his witnesses upon the stand, it is not for this court to interfere. Perceiving no error in the record, the judgment must be affirmed.

Affirmed.

14	438
9a	187
14	438
11a	319

14	438
135	126

DIAMOND TUNNEL GOLD & SILVER MIN. CO. ET AL. V.
FAULKNER ET AL.

1. PRACTICE IN SUPREME COURT—A JOINT APPEAL NOT MAINTAINABLE UNLESS EACH APPELLANT ENTITLED TO AN APPEAL.—Under the act of 1889, page 77, providing for appeals from courts of record to the supreme court, a joint appeal will not lie in any cause unless as to each appellant there exists a final judgment or decree amounting to the sum of \$100, exclusive of costs, or relating to a franchise or freehold. When, therefore, the only judgment rendered against a portion of the defendants is a judgment for costs, a joint appeal will be dismissed on motion of the appellee.
2. DISMISSAL OF APPEALS—IF THE MOTION THEREFOR CONTAIN SUFFICIENT GROUNDS, THAT IT ALSO RECITE INSUFFICIENT GROUNDS CONSTITUTES NO WAIVER OF APPELLEE'S RIGHTS.—The appellee does not waive his right to have the appeal dismissed by asserting in his motion as an additional reason therefor that the purported transcript is scandalous and irregular, and cannot be treated as a transcript under the rules of the court.

Appeal from District Court of Clear Creek County.

MOTION to dismiss appeal.

A judgment for \$900 was rendered against the Diamond Tunnel Gold & Silver Mining Company, but there was

no judgment for money against any of the other defendants. A joint appeal was prayed and allowed.

Mr. W. T. HUGHES, for appellants.

Messrs. MORRISON & FILLIUS, for appellees.

MR. JUSTICE HAYT delivered the opinion of the court.

By the law governing appeals to this court, in force at the time this appeal was taken, it is provided that "appeals to the supreme court from the district, county and superior courts shall be allowed in all cases where the judgment or decree appealed from be final, and shall amount, exclusive of costs, to the sum of \$100, or relate to a franchise or freehold." Sess. Laws 1889, p. 77.

The motion to dismiss the appeal is based principally upon the ground that as to said appellants, other than the Diamond Company, there was no final judgment or decree against them upon which an appeal would lie; that is to say, there was no final judgment or decree against such appellants or either of them, amounting to the sum of \$100, exclusive of costs, or relating to a franchise or freehold. Appellee contends that, as the appeal is joint, it must be dismissed upon this motion unless all the defendants were entitled to an appeal. In support of this position the following decisions of this court are cited: *Andre v. Jones*, 1 Colo. 489; *Fuller v. Placer Co.* 5 Colo. 123.

In the first of the above cases Jones had recovered judgment against two defendants, who prayed and were allowed a joint appeal. Within the time given for such appeal, one of the defendants only filed the required bond, the other defendant not joining in the appeal. Upon the case reaching this court, a motion to dismiss the appeal was sustained, the court holding that, while the defendants might have prayed joint and several appeals, they did not do so, but both united in the only

appeal which was prayed, and that such a joint appeal could not be prosecuted by one alone. In the subsequent case of *Fuller v. Placer Co.*, *supra*, the case of *Andre v. Jones* was expressly affirmed, and it was further held that the statute of 1879, authorizing one of several defendants to remove a case to this court by appeal, and permitting him, in such case, to use the names of all the defendants if deemed necessary, did not affect the rule that a joint appeal by all the defendants must be prosecuted by all.

Applying the doctrine of these cases to the case at bar, it is clear that under the order of the court below, allowing a joint appeal, the appeal could not properly have been taken by a portion only of the defendants. It is equally clear from the statute that the defendants Woodward, Gay and Watkins were neither of them entitled to take an appeal, as an appeal will not lie from a judgment for costs only. A review in such case can only be had upon a writ of error.

The appeal must therefore be dismissed as to them, and if the company should be allowed to proceed in their absence it would be permitting a joint appeal by two or more to be prosecuted by one only. This, as we have seen, cannot be allowed without interfering with the long-established practice of this court. This rule grows out of the liability upon the appeal bond. The sureties upon the bond in this case have not obligated themselves to answer for the result of an appeal to be prosecuted by the corporation only, and appellees are therefore entitled to have the appeal dismissed, unless they have waived their right to insist upon this motion. *Brooks v. Jacksonville*, 1 Scam. 568; *Curry v. Hinman*, 3 Gilman, 90; *Orton v. Tilden*, 110 Ind. 131.

A waiver is claimed in this case because of the third reason assigned by appellees in support of the motion to dismiss the appeal, which is as follows: "(3) The instrument, purporting to be a transcript of the record, is so

scandalous, irregular and informal that it cannot be treated as such transcript, as is required by the rules of this court." It is difficult to see how this can be treated as a waiver. It is but another reason advanced in support of the motion to dismiss the appeal, and a party cannot be held to have waived that which he has been at all times insisting upon, and to which he otherwise appears to be entitled, simply because he advances a further reason therefor, which may not be considered good.

As the appeal must be dismissed for the reasons already given, it is not necessary to consider other objections.

Dismissed.

ROBERTSON V. O'REILLY ET AL.

APPEAL — FAILURE OF APPELLANT TO SERVE NOTICE WAIVED BY GENERAL APPEARANCE OF APPELLEE.— In case of an appeal from the county court to the district court under the act of 1885 (Sess. Laws, 1885, p. 159) by a defendant some days subsequent to entry of judgment against him, his failure to serve notice of the appeal upon the plaintiff within five days after taking the same is waived and cured by a full appearance in the district court by the appellee and his participation in the action of the court in setting the cause down for trial *de novo*. Such action is a waiver of appellee's privilege to have the appeal dismissed or the judgment affirmed for failure to serve the required notice.

Error to District Court of Pitkin County.

Messrs. PORTER, PLUMB, EDWARD T. TAYLOR and J. W. TAYLOR, for plaintiff in error.

Messrs. DOWNING & FRANKLIN, for defendants in error.

RICHMOND, C. This was an action originally commenced in the county court of Pitkin county by O'Reilly and Babcock, plaintiffs below, and judgment obtained therein against Robertson, defendant below, for the sum of

14	441
14	450
14	441
16	11
16	40
14	441
17	49
14	441
14	131
14	441
8a	85
14	441
25	504

§792. Some time thereafter defendant perfected an appeal to the district court. On the 19th of July, 1886, plaintiffs filed a motion in the district court to affirm the judgment of the county court, which motion was granted. Thereupon defendant prosecuted this writ of error.

The record in this case shows that the appeal had been taken from the county court to the district court, transcript of record filed, and, at a regular term succeeding the appeal, plaintiffs and defendant appeared by their attorneys, and that at the February term, 1886, of the district court, at the request of J. M. Downing, attorney for plaintiffs, the cause was regularly set for trial, and thereafter, during that term, the defendant filed a motion for a continuance thereof until the next term of court; that said motion was, during said term, regularly heard by the court, and on the hearing thereof the defendant appeared by Plumb & Moore, his attorneys, and the plaintiffs appeared by Downing & Franklin, their attorneys; that said motion of continuance was allowed until July term, A. D. 1886; that on the 13th day of July, 1886, being one of the regular term days of said July term, said action was again regularly set for trial; and that thereafter plaintiffs submitted their motion to affirm said judgment because the appellants had failed to serve upon the appellees or their attorneys a notice of the appeal having been taken, as provided by section 4 of an act relating to appeals from county courts to district courts. Sess. Laws 1885, p. 159.

There are but two assignments of error: *First*, the court erred in sustaining the motion of the plaintiffs, filed July 19, 1886, to affirm the judgment of the county court in this action; *second*, the court erred in rendering judgment for said plaintiffs without first giving the defendant an opportunity to try the issue joined in said action by a regular trial in said district court. Both errors can be considered together.

The section of the Session Laws referred to reads as

follows: "If the appeal be not taken on the same day on which the judgment is rendered, the appellant shall serve the appellee, or his attorney of record, within five days after the appeal is taken, with a notice, in writing, stating that an appeal has been taken from the judgment therein specified, which notice shall be served by delivering a copy thereof to such appellee or his attorney of record. If the appellant fail to give notice of his appeal when such notice is required, the appellee may, at any time before notice is actually served, and after the time when it should have been served, have the judgment of the county court affirmed or the appeal dismissed, at his option.

The language of this section is simple and easily understood. Under it the unsuccessful party in the county court has a right of appeal, which may be taken on the same day on which judgment is rendered, or may be taken at some subsequent period of time. But, when taken on any day other than the day on which the judgment is rendered, it is incumbent upon him to serve the appellee or his attorney of record, within five days after the appeal is taken, with a notice, in writing, stating that an appeal has been taken from the judgment therein specified; and in case he shall fail to give such notice the appellee is entitled to appear in the district court, and have the judgment of the county court affirmed, or the appeal dismissed.

It is admitted that the appeal was not prayed on the day on which the judgment was rendered, but was taken within the time prescribed by the statute, and that no notice was served upon the appellee or his attorney. It is contended that the appearance of the appellee, and the setting of the cause for trial, participating in the motion for continuance, and at a subsequent term appearing and setting the cause for trial, was a waiver of the service of notice required by the section referred to. The right of appeal from the county court to a district court

is unquestioned. If the appeal was not perfected, the district court would have acquired no jurisdiction to affirm the judgment of the county court. Consequently, it is apparent that the jurisdiction of the district court over the subject-matter of the action in no way depends upon the service of the notice upon the opposite party; that it confers upon the opposite party a privilege of a personal character, which he may exercise at his option, of dismissing the appeal, or affirming the judgment,—a privilege which he waives when he enters a general appearance in the cause, and participates in the action of the court in setting the same for trial *de novo*. There can be no question but that, had the attorney appeared at the first term after the appeal had been taken, and then and there interposed his motion for dismissal or affirmation of the judgment, the court would have been warranted in granting such motion. This has recently been determined by this court in the case of *Hunt v. Arkell*, 13 Colo. 543, and also in *Law v. Nelson*, ante, p. 409.

It would be useless to cite the innumerable authorities in support of the proposition that plaintiffs' appearance in the district court for the purpose of having the cause set for trial, and arguing the motion for a continuance, was a general appearance, and that, by so appearing, they waived the personal privilege of having the judgment affirmed for want of service of notice of the appeal.

Their right to have the appeal dismissed, or judgment affirmed, depended entirely upon the want of service of such notice. Their appearance, so made, waived the notice, and deprived them of the right to make the motion.

Counsel argued that the legislature evidently intended that this provision requiring notice of appeal to be served should be rigidly enforced. "It doubtless required the service of such notice as one of the steps to be taken by appellant in the due prosecution of his appeal." This position is not tenable. The appeal is fully prosecuted,

and taken without notice. Else, as has heretofore been said, the district court could by no method obtain jurisdiction to affirm the judgment.

Both parties to this action undoubtedly overlooked the provisions of the section under discussion; the one to a period of time when it was too late for him to invoke the privileges conferred, and the other to a period of time within which he was liable to lose his right to a trial *de novo* in the district court. While it is true that this court has not hitherto passed directly upon the question here involved, it is nevertheless clear that plaintiffs waived their right to the notice of the appeal by a general appearance in the cause in the district court for a purpose other than the enforcement of their statutory privilege of having the judgment affirmed, or the appeal dismissed. Hence the district court erred in affirming the judgment of the county court.

The judgment should be reversed and the cause remanded for further proceedings.

PATTISON and REED, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is reversed and the cause remanded.

Reversed.

STRAAT, IMPLEADED, ETC. V. BLANCHARD.

1. PRACTICE IN CIVIL ACTIONS — WHEN APPEAL DEEMED "TAKEN." — An appeal is taken, within the meaning of section 4 of the act of 1885, relating to appeals from county to district courts, when the appeal bond is filed and approved.
2. FAILURE TO SERVE NOTICE OF APPEAL IN TIME PRESCRIBED NOT CURED BY SUBSEQUENT NOTICE. — If appellee gives written notice to appellant that he will apply for dismissal of the appeal, or affirmation of the judgment, under said act, and follows it up with diligence, a subsequent notice by appellant that the appeal has been taken will not be allowed to defeat the statutory rights of appellee.

14	445
17	49
14	445
1a	93
14	445
5a	87

Appeal from District Court of Lake County.

Mr. J. E. HAVENS, for appellant.

Messrs. J. B. BISSELL and A. T. GUNNELL, for appellee.

MR. JUSTICE ELLIOTT delivered the opinion of the court.

The uncontroverted facts appearing of record in this case may be summarized as follows:

On August 27, 1887, judgment was rendered by the Lake county court; and on the same day, in open court, appellant gave notice of appeal to the district court. On September 3d, by agreement of parties, the court allowed appellant twenty days in which to file his appeal bond. On September 22d the appeal bond was filed and approved in the clerk's office of the county court. On September 29th the transcript of the case was filed in the clerk's office of the district court. On September 30th counsel for appellee served appellant with written notice that they would on October 3d move the district court to "affirm the judgment heretofore rendered in said cause, for the reason that no notice of an appeal has been served on the plaintiff or his attorneys, as by law required." On the same day, September 30th, but not until after the foregoing notice had been served, counsel for appellant served appellee with notice that the appeal in said cause had been "taken and perfected." On October 3, 1887, the motion of appellee, being submitted to the district court, was, upon due consideration, sustained, and the judgment of the county court affirmed. To reverse this judgment this appeal is prosecuted.

The questions presented by this appeal involve the further consideration of the act relating to appeals from county to district courts. Sess. Laws 1885, p. 158. In *Hunt v. Arkell*, 13 Colo. 543, and in *Law v. Nelson*, ante, p. 409 (decided at this term), section 4 of said act has been construed in relation to the facts and circumstances of

those cases. In those cases it was contended that the appeal should be considered "taken," so as to dispense with the written notice, when the record shows that the appeal was prayed and allowed on the same day on which judgment was rendered. In this case the contention is that the appeal should not be considered "taken" until the transcript from the county court is actually filed in the district court. Hence, it is argued that the five days in which appellant had to serve the written notice under the statute did not begin to run until September 29th. In other words, that no notice was required to be given, so long as some act remained to be performed in connection with the taking of the appeal. A brief consideration of the object of the statute will show that the contention of appellant in this case is as untenable as in the former cases. The object of the statute was to mitigate the evil of dilatory appeals. It does not follow, because an appeal is prayed and allowed, that the same will be taken or perfected. The filing and approval of the appeal bond suspends the rights of the prevailing party in the county court, and gives the district court jurisdiction. Hence the notice is required to be given, not before, but immediately after, the filing and approval of the bond; that is, when the appeal begins to operate adversely to appellee, so that he can without delay take such steps as he deems proper to dispose of the appeal. To hold that the notice need not be given until the transcript be filed in the district court would be to perpetuate and augment the very evil which the statute was designed to remedy. We see no reason to doubt the correctness of the former decisions that the time when the appeal is to be considered taken, within the meaning of section 4 of the act, is when the appeal bond is approved and filed.

It is further contended by counsel for appellant that, since notice in writing, stating that the appeal had been taken, was actually served upon appellee before he obtained the judgment of affirmance, he was not entitled,

according to the literal terms of the statute, to have such judgment rendered. If the statute be thus construed, the consequences would be that no appellee would be able to assert his rights thereunder, unless allowed to do so without giving notice; for the reason that every appellant, upon receiving notice of the intended application for judgment of affirmance or dismissal, would be able to give the written notice required by section 4 before the judgment of affirmance or dismissal could be rendered. Such a construction would nullify the statute altogether, or it would involve the absurdity that a judgment of affirmance or dismissal, obtained *ex parte*, is less vulnerable than one rendered upon due notice.

The statute under consideration does not require the previous filing of a written application to dismiss the appeal or to affirm the judgment; but the code does require the previous service of a written notice of such application. *Cates v. Mack*, 6 Colo. 401. Hence, if appellee gives such notice and follows it up with diligence, a subsequent notice by appellant that the appeal has been taken will not be allowed to defeat the statutory rights of appellee; but his application will be regarded as having been made when he took the first necessary step by the service of the notice to that end. The statute may be a harsh one, as counsel say, but an appeal is the creature of positive law. It is a special privilege, subject to statutory regulations; and those who invoke the benefit of the statute must strictly and diligently pursue its requirements or they cannot enjoy the privilege. *Vigilantibus, et non dormientibus, servat lex*. The judgment of the district court is affirmed.

Affirmed.

MR. JUSTICE HAYT (*dissenting*). The district court, upon appeal, affirmed the judgment of the county court upon motion, without giving appellant any opportunity to have his case heard upon its merits. Ought such ac-

tion to be sustained? This is the sole question presented for our determination upon this record.

It is conceded that no authority can be found in support of the action of the district court, unless it grows out of the following section of the statute relating to appeals to that court from the county court:

"Sec. 4. If the appeal be not taken on the same day on which the judgment is rendered the appellant shall serve the appellee, or his attorney of record, within five days after the appeal is taken, with a notice in writing stating that an appeal has been taken from the judgment therein specified, which notice shall be served by delivering a copy thereof to such appellee or his attorney of record. If the appellant fail to give notice of his appeal when such notice is required, the appellee may, at any time before such notice is actually served, and after the time when it should have been served, have the judgment of the county court affirmed or the appeal dismissed, at his option." Sess. Laws, 1885, p. 159.

In this case the notice of the appeal had been actually served before any steps were taken in the district court by appellee for the purpose of having the judgment affirmed. Hence, it is clear that, by the literal terms of the act, appellee was not entitled to the judgment of affirmance. It is claimed, however, that appellee was within the spirit of the provision. The statute is a harsh one, penal in character, and ought not, in my judgment, to be thus extended by construction. Appellant is not required to give notice of his intention to take an appeal. The notice must be to the effect "that an appeal has been taken from the judgment therein specified." From this it is apparent that the giving of notice is not a necessary step in perfecting the appeal.

The appeal was perfected when the appeal bond was approved and filed. This has been repeatedly announced by this court. The jurisdiction of the district court to affirm the judgment can only be maintained upon the

theory that the appeal had been perfected. Therefore, the rule requiring statutes providing for appeals to be strictly construed against the appellant has no application. The appeal in this case having been properly perfected, appellee, before he was entitled to have the judgment affirmed, or the appeal dismissed, for failure to give the required notice, must show his right to such a judgment affirmatively, and ask that it be entered. The court cannot act *sua sponte*. The failure of notice must be shown by affidavit, unless waived; and appellee must, in some appropriate way, give notice to the court of his intention to take advantage of the statute. If he proceeds without doing this, his right is thereby waived. *Robertson v. O'Reilly*, ante, p. 441. He must also indicate to the court his election as to whether he will have the appeal dismissed or the judgment affirmed. In the case of *Law v. Nelson*, ante, p. 409, the action of the court was based upon a written motion supported by affidavit; and the convenience of such practice is apparent. Until appellee signifies his intention to avail himself of the statute by filing a motion or affidavit, or in some way invoking action of the court in his favor, appellee should be allowed to serve his notice of appeal, and thereby prevent summary action of the court against him.

By the terms of the act, appellee's right to have the appeal dismissed or the judgment affirmed, at his election, is made to depend upon his moving in the matter before the notice of the appeal has been served upon him. The appellant is not only given five days in which to serve such notice, but he may do so at any time before appellee becomes an actor and signifies his intention to claim the benefit of the statute.

The written notice of motion provided by the code has, I think, always been construed to require notice simply of the time set for the hearing of the motion; and appellee ought not to be allowed to cut off appellant's right to give notice of the appeal, and thereby deprive him of

an opportunity to have his case tried upon its merits, by anything short of an application or notice made or filed with the court. No good reason is perceived why a notice given out of court, by appellee, of his intention to make such an application at a future time, should operate to preclude appellant from giving notice of the appeal, and subject him to the penalty of the statute.

By permitting appellants to give the notice of appeal at any time before steps have been actually instituted *in the district court* for the purpose of having the appeal dismissed or the judgment affirmed, full force and effect is given to the statute.

In this state county judges are not required to be learned in the law. In fact, these offices are not infrequently filled by those who have never been admitted to the bar, and no strained construction should be placed upon the statute that will result in preventing a review by appellate courts of the merits of cases determined before these tribunals.

The conclusion reached by the majority of the court, in my judgment, is not warranted by the language of the act, and ought not to be upheld.

Affirmed.

HUNT ET AL. V. EUREKA GULCH MINING Co.

1. PLEADING — THE CHARACTER AND OBJECT OF AN ACTION DETERMINED BY THE COMPLAINT.— The allegations of a complaint determine the character and object of an action, and the plaintiff cannot be permitted, after the trial of a cause, to assume a wholly different object as the purpose of the action.
2. AN ACTION IN SUPPORT OF AN ADVERSE CLAIM NOT MAINTAINABLE UNLESS THE ADVERSE BE FILED WITHIN THE SIXTY DAYS OF PUBLICATION.— When an application is filed in a United States land-office for a patent to mining premises, and notice of the application is published as required by the United States Statutes, a suit to contest the rights of the applicant cannot be maintained under section 257 of the Civil Code, unless the plaintiff shall have

14	451
16	346
14	451
19	347
14	451
30	559

filed his adverse claim to the premises in said land-office, as provided by section 2326, Revised Statutes of the United States, within the sixty days of publication required to be made by the register, upon filing the application for patent. Such action cannot be maintained when the adverse claim is not filed until sixty-two days after the commencement of the publication.

Appeal from District Court of San Juan County.

CIVIL CODE, section 257, provides that an action may be brought by any person in possession of real property against any person who claims an estate or interest therein adverse to him for the purpose of determining such adverse claim or estate.

Revised Statutes of the United States, section 2326, provides that, where an adverse claim to the issuance of a patent for mining lands is filed during the period of publication of notice of application for the patent, all proceedings shall be stayed until the controversy is settled by a court of competent jurisdiction.

Messrs. HUDSON & SLAYMAKER, for appellants.

Messrs. MONTAGUE & FITCH and SAMUEL SLESSINGER, for appellee.

RICHMOND, C. By the record in this case it appears that the appellee, defendant below, on the 26th day of October, 1885, filed its application for a United States patent for a certain mining claim, particularly described in the complaint, called "No Name Lode," under the provisions of sections 2325, 2326, Revised Statutes of the United States; that notice of the application, by direction of the register and receiver of the United States land-office at Durango, Colorado, was published in the Animas Forks Pioneer, and that the notice first appeared in the issue of said newspaper on the 31st day of October, 1885, and appeared in each and every weekly issue of said newspaper thereafter, up to and including

the 2d day of January, 1886; that on the 1st day of January, 1886, appellants, E. W. Hunt and Thomas Doyle, plaintiffs below, filed their adverse to the application of appellee for a patent, and thereafter, on the 27th day of January, 1886, instituted this action to support such adverse filing.

The cause was tried to the court, and the court found that the adverse claim was not filed within the time allowed by law for filing adverse claims, and therefore dismissed the action, at plaintiffs' cost. To reverse this action this appeal is prosecuted.

The question for our determination is, did the plaintiffs file their adverse claim within the time allowed by law? if not, can they maintain their action? In the brief and argument appellants take the position that, whether an adverse claim be filed in the land-office or not, still they are entitled to maintain their suit under section 257 of the Civil Code. The complaint in this case clearly shows the cause of action which the pleader intended to state. No one can read it and fail to conclude that the suit was brought upon an adverse filing, to contest defendant's application for patent to the premises in controversy, and that the purpose of the pleading was to put in issue and try the questions which by section 2326, Revised Statutes of the United States, are submitted to courts for adjudication. The language of the complaint is that they "were the owners of and in possession of certain mining premises situate, lying and being in Eureka mining district in the county of San Juan, Colorado; * * * that the said premises comprise all of that certain lode mining claim that is known and recorded as the 'Nameless Lode;' that the defendant claims an estate or interest in and to said premises, and all thereof, adverse to that of plaintiffs; that defendant has made application at the United States land-office at Durango, Colorado, for a patent for all of said premises, claiming in said application to be the owner of said

premises under the name of the 'No Name Lode;' that the application for the patent is still pending, and that the plaintiffs on the 1st day of January, 1886, to protect their title and right of possession in and to said premises, filed in the United States land-office at Durango, Colorado, their protest and adverse claim against the issuing of a patent for said premises to defendant or other person; that this suit is begun in support of the said adverse claim of the plaintiffs."

The above is all of the complaint necessary for us to recite to indicate unmistakably the purpose and object of the action. To permit the plaintiff, after the trial of the cause, to assume altogether another and a different object, would be in violation of every rule of pleading. The allegations in the complaint determine the character and object of the action. *Becker v. Pugh*, 9 Colo. 589; *Mining Co. v. Kirtley*, 12 Colo. 410.

The plaintiffs having elected to proceed under the provisions of the section above referred to, the next and only remaining inquiry is, did they bring themselves within the provisions of those sections? It is admitted by the complaint and in the argument of appellants that the appellee made its application for the patent on the 26th day of October, 1885, and that, pursuant to the order of the register and receiver of the United States land-office, notice of this application was published on the 31st day of October, 1885, and that the appellants did not locate the claim and file the adverse until the 1st day of January, 1886.

Section 2325 provides that, upon filing an application for a patent for land, the register of the land-office "shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim, and he shall also post such notice in his office for the same period of time. At the expiration of the sixty days of publication the claimant shall file his affidavit showing that the

plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land-office, at the expiration of the sixty days of publication it shall be assumed that the applicant is entitled to a patent upon the payment to the proper officer of \$5 per acre, and that no adverse claim exists, and thereafter no objection from third parties to the issuance of the patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter."

In *Wight v. Dubois*, 21 Fed. Rep. 693, Judge Brewer, adopting the construction of these provisions announced by Judge Hallett in the same case, sums up in brief his conclusions (page 696), as follows: "(1) The government, as a land-owner, offers its lands for sale upon certain prescribed conditions, compliance with which is a matter of settlement between the owner and the purchaser alone, and with which no stranger to the title can interfere. (2) Publication of notice is process bringing all adverse claimants into court, and, if no adverse claims are presented, it is conclusively presumed that none exist, and that no third parties have any rights or equities in the land. (3) Thereafter the only right or privilege remaining to any third parties is that of protest or objection filed with the land department, and cognizable only there; if sustained by the department, the proceedings had by the applicant are set aside; if overruled, the protestant or objector is without further right or remedy."

Accepting the above conclusions of the learned judge as being the correct interpretation of the statute, it follows that, unless the appellants have brought themselves within the provisions of the law by filing their adverse claim within the sixty days provided for the publication of notice, the action of the court in dismissing the complaint must be sustained.

It is contended by appellants that because this notice

was published first on the 31st day of October, 1885, and last on the 2d day of January, 1886, and their adverse claim was filed on January 1, 1886, the adverse was duly filed within the period of time prescribed by law. In other words, appellants claim that they have sixty-two days within which to file their adverse. This very question has received the consideration of the honorable secretary of the interior in *Miner v. Marriott*, 10 Copps, Land Own. 339. He held that, notwithstanding the fact that the regulations of the department require ten weekly publications of such notice, making sixty-three days between the first and last publication, yet, nevertheless, the adverse claim must be filed within sixty days, as provided by the statute. In arriving at this conclusion the honorable secretary says that "nine issues of a weekly paper would not cover the required period. It is true that the tenth insertion carries the publication three days beyond the legally required sixty days, yet for the purpose of meeting the requirement of law ten insertions are in fact necessary, since the continuity for sixty days can be preserved only by the tenth publication, which falls on the sixty-third day after the first. It is also true that the applicant cannot proceed to complete his entry until after the tenth publication, but this is because it is essential as proof of sixty days' publication. These reasons do not apply to an adverse claimant, and his acts are not controlled thereby. He has the plain letter of the law for his guide. His course is clear and his duty plain. He has sixty days, on any one of which he may file his adverse claim; if he fails to file within the sixty days of publication prescribed by the law, he is barred. Before either party can recover in an 'adverse' mining suit he must show a compliance with the statutes, state and federal, and local miners' rules and regulations relating to the location of mining claims." *Becker v. Pugh*, *supra*.

We are not without authority in our own court to sup-

port the conclusions of the court below. In *Mining Co. v. Kirtley*, *supra*, this court held that "an allegation in the complaint, in an action for the recovery of possession of a mining claim, that the action is brought in support of adverse claims, must be regarded as determining the character and object of the action, viz., to establish plaintiff's right to possession by reason of a valid location thereof under the adverse claims in support of which the action is brought, and to stay defendant's proceedings under his application for a patent until the plaintiff's right under his adverse claims may be adjudicated. * * * It therefore becomes a material question whether the requirements of the statute in relation to filing such claims have been complied with," and an allegation in the answer that defendant's right to a patent was not adversely by a claim under which plaintiff claims the right of possession of the premises in controversy presents a good defense. Quoting further from this opinion, at page 415, after citing the statute, the court says: "By these provisions of the statute, the filing of an adverse claim is made the first step to be taken in proceedings for determining the right of possession and title under a valid location for the purpose of establishing the right to a patent, and upon taking this step the issuance of a patent is stayed until such right has been determined, or has been waived by the party filing such adverse claim. That a party who commences an action under the statute to determine such right of possession must stand or fall by the rights which he has asserted in his adverse claim seems evident from the requirement of the statute that the nature, boundaries and extent of such adverse claim must be shown by the adverse claim filed."

In the *Eureka Case*, 4 Sawy. 302, Justice Field uses this language: "When one is seeking a patent for his mining location, and gives proper notice of the fact as therein prescribed, any other claimant of an unpatented

location objecting to the patent of the claim, either on account of its extent or form, or because of asserted prior location, must come forward with his objections, and present them, or he will afterwards be precluded from objecting to the issue of the patent."

Appellants cite in support of their position *Decker v. Myles*, 4 Colo. 558. The conclusion of the court in that case was based upon a section of law which required a notice to be published once a week for three consecutive weeks; consequently it is not in point. Other cases cited are not upon similar provisions; therefore do not apply. The number of publications is not provided for by the provisions of the United States law. By no system of computation can we arrive at any other conclusion than that the full time required by the statute had expired before plaintiff's adverse claim was filed. "A distinction, however, is made between statutes requiring publication for a certain period of time in what manner soever such period is denominated, and those requiring the insertion of the notice a certain number of times in a newspaper, where the continuance of the publication will be determined by the number of regular issues within a given time." Wade, Notice, § 1077.

The time for filing an adverse can no more be extended than can be the time for commencing action after filing such adverse, and it cannot be said that the plat and notice required to be posted on the claim must remain so posted for a longer period than sixty days. The publication is made by posting a notice in the office of the register and receiver, upon the claim, and publishing in a newspaper for the period of sixty days. Failure to do either would not be a compliance with the statute, but, as in this case, doing all in the manner directed will defeat an adverse claimant who fails to file the adverse within the period of sixty days. Our conclusion, therefore, is that, the plaintiffs having failed to file their adverse in the United States land-office within the time

prescribed by the statute, the court was justified in dismissing the complaint.

The judgment should be affirmed.

PATTISON and REED, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

Affirmed.

HAYT, J., having presided at the trial below, did not participate in this decision.

GULDAGER V. ROCKWELL.

1. PRACTICE IN CIVIL CASES — COMPULSORY NONSUITS IN JURY TRIALS.

In a case tried to a jury the court may, on motion of defendant, enter a judgment of nonsuit when the plaintiff fails to introduce sufficient evidence to warrant a finding and judgment in his favor.

2. ACTION FOR DAMAGES FOR CAUSING DEATH OF HUSBAND — PLEA OF ACCORD AND SATISFACTION.— In a suit by a widow for damages for causing the death of her husband, defendant, having pleaded accord and satisfaction, produced a paper signed by the parties, which, after reciting that defendant had bought certain horses and mules of plaintiff, surrendered certain notes of her deceased husband, and paid her certain moneys, states that these are "in full demands of every name and nature whatsoever from one party to the other." Plaintiff testified that at the time of signing the paper she knew she had a claim on account of the death of her husband, and intended to bring suit upon it, but did not mention it then because she did not want to. The court properly directed a verdict for the defendant.

Error to District Court of Arapahoe County.

Mr. F. A. WILLIAMS, for plaintiff in error.

Mr. L. C. ROCKWELL, *pro se*.

RICHMOND, C. In this action plaintiff in error seeks to recover from defendant in error damages for negli-

14	459
19	57
14	459
13a	515
14	459
18a	12
14	459
36	532

gence, resulting in the death of her husband while in the employ of the defendant in error. The complaint, as amended, contains the usual and necessary averments, to which the defendant in error answers, setting up three defenses: *First*. A general denial. *Second*. Contributory negligence. *Third*. Accord and satisfaction. The second and third defenses are specifically denied in the reply of plaintiff in error.

The cause was tried to a jury, and after all the evidence had been submitted on the part of both plaintiff and defendant the court instructed the jury that they should find for the defendant.

The main, and indeed the only, contention of plaintiff in error necessary for us to consider is whether the court erred in instructing the jury to return a verdict in favor of defendant. .

It appears that plaintiff in error's husband received the injury which resulted in death, and for which she seeks to recover damages, on the 8th day of January, 1883, and that this action was not instituted until the 1st day of June, 1886. In the trial of this cause, and in support of the defense of accord and satisfaction, the defendant introduced the following instrument of writing: "This is to certify that Mrs. Andrew Guldager and L. C. Rockwell have this 26th day of April, inst., had a full and final settlement, in which said Rockwell takes the mules and horses at \$350 cash, and surrenders to Mrs. Guldager two notes of Andrew Guldager, one for \$300, dated March 28, 1881, due on or before one year after date, and another note due March 28, 1882, for \$30, due on demand, which notes and interest amounted, on the 28th of March, 1883, to \$363, and Rockwell has also paid her two hundred and eighty-seven dollars and thirty-four one-hundredths (\$287.34) cash, which is in full demands of every name and nature whatsoever from one party to the other. April 26, 1883. L. C. ROCKWELL. MARY GULDAGER."

Mrs. Guldager, in rebuttal, testifies: "I made no claim of Rockwell on account of the death of my husband. Did not mention it, because I did not want to. Did not consult anybody in regard to it until I returned to Denver. I knew all the time that I had a claim against him, and when I made this settlement, and signed the receipt, I expected to bring this suit. I did not say anything to Rockwell about it."

The action of the court was based upon the fact that plaintiff in error admitted that when she signed the receipt she had full knowledge of the demand sued upon, and at the time of the execution of the written instrument for settlement she said nothing about it, and intended to bring this action. The plaintiff in error insists that it was the duty of the court to submit the cause of action to the jury, and contends that, where there is any evidence in support of a fact in issue, it must be submitted to the jury.

We cannot agree with this position. It is the peculiar province of the court to determine all questions of law arising before it, and the undoubted right of the jury to find all matters of fact when evidence legally sufficient for that purpose is submitted for their consideration, and the legal sufficiency is a question of law, of which the court is the exclusive judge. It is true authorities can be cited in support of the doctrine that where there is any evidence, however slight, tending to support a material issue, the case must go to the jury, since they are the exclusive judges of the weight of the evidence. This doctrine, however, is denied in all the courts of England, as well as in the American federal courts and in many of the courts of the American states. In 2 Thomp. Trials, § 2249, the author says: "The old rule is likewise exploded in several of the states whose courts are now in the constant habit of ordering nonsuits against the consent of the plaintiff, of giving peremptory instructions to the jury to find for one party or the other, or of sustain-

ing demurrers to the evidence in cases where there is confessedly some evidence supporting a material issue. * * * Where the facts are undisputed or admitted, the only questions for decision are questions of law. In such a case it only remains for the judge to apply the law to the facts, and to decide whether they constitute a cause of action or defense. But where the facts are disputed and the evidence in respect to them is conflicting, such is not the case." Id. § 2262.

"The day has gone by when courts will refuse to enter a judgment of nonsuit upon motion of defendant, when the plaintiff has failed to introduce sufficient evidence in a case, tried by a jury, to support a verdict for the plaintiff, and in a case tried to the court to warrant a finding and judgment in favor of the plaintiff." *Tripp v. Fiske*, 4 Colo. 25; *Behrens v. Railway Co.* 5 Colo. 400; *Schwenke v. Railroad Co.* 12 Colo. 341.

✓ It is proper for the court to grant a nonsuit, or direct a verdict for the defendant, where the issues involved in an action are negligence on part of the defendant, and contributory negligence on part of the plaintiff, when the evidence, considered in its most favorable light in behalf of the plaintiff, does not tend to show the defendant guilty of the negligence alleged against him, or when the evidence, thus considered, shows the plaintiff guilty of negligence which contributed to the alleged injury, and without which it would not have happened. *Lord v. Refining Co.* 12 Colo. 390.

In this case the plaintiff in error admitted that she knew she had a right of action against defendant in error; that she intended at some subsequent period to bring suit against him. Nevertheless, in the face of this knowledge, she made a settlement with the defendant in error, and signed the paper above recited, in which she admits the receipt of \$287.34 cash in full of demands of every name and nature whatsoever due from the defendant to her. The terms of the contract of settlement,

taken by themselves, are susceptible of no other construction than that every claim which she and the defendant were cognizant of at the time of the settlement was fully and completely passed upon and settled on the 26th day of April, 1883, from which date, until the institution of this action, she never mentioned the fact that she had a claim against the defendant in error; never gave him any opportunity of settling such claim; and, indeed, so far as the record discloses, never, directly or indirectly, intimated that she had this right of action, or that she had intended to commence this suit.

Treating this paper as a receipt, there can be no doubt that the plaintiff in error was at liberty to introduce evidence to show that she had signed it through mistake, or that it was obtained by fraud or misrepresentations on the part of the defendant in error. Although a written receipt may be contradicted, yet all the authorities acknowledge that it is evidence of the highest and most satisfactory character, and to do away with its force the testimony should be convincing, and not left to mere impressions, and the burden of proof rests on the party attempting the explanation. This the plaintiff wholly failed to do. The term "all demands" is recognized in the books as being one of the most comprehensive that can be used. It may, it is true, be limited by other parts of the contract in which it is used. "But proving existing facts to aid interpretation is a different thing from proving mental intentions of parties." *Henry v. Henry*, 11 Ind. 236.

A careful examination of the entire record in this case fails to disclose any claim on the part of plaintiff in error that she accepted the paper through mistake, or upon misrepresentations made by the defendant in error, or that any fraud was practiced upon her. On the contrary, she asserts that she knew what she was doing. To destroy the effect of a receipt, such circumstances may be

shown at law as would lead a court of equity to set aside a contract; such as fraud, mistake or surprise. A receipt executed with a full knowledge of all the circumstances, and without mistake or surprise on the one part, or fraud or imposition on the other, is a good defense to a claim. *Fuller v. Crittenden*, 23 Am. Dec. 364; *Bonnell v. Chamberlin*, 26 Conn. 487.

Plaintiff's conduct in accepting money paid at the time, taking up the notes of her husband, surrendering the property, and executing the release in full of all demands, and accepting a release from the defendant in error in full of all demands against her and the estate of her husband, amounts to something more than an execution of a mere receipt. It is a contract executed upon due consideration. Plaintiff in error executed this agreement with full knowledge of the facts. The inference is fair that, when the paper was signed, she knew that defendant understood the transaction to be a complete settlement and discharge of all matters of difference which existed between them. It is true that the claim for damages sought to be enforced in this action was not mentioned by the parties. And it is contended that the minds of the parties never met, so far as this particular demand is concerned. Plaintiff, however, executed an instrument which declared that the parties had had a full and final settlement, and acknowledged the receipt of a sum of money in full of all demands whatsoever. The money was paid by defendant pursuant to the settlement, of which the written instrument was the evidence, and in compliance with its terms. It was received by plaintiff as the performance, on the part of defendant, of a contract which he understood to be a final discharge and satisfaction of all demands. Defendant understood the contract just as it reads. Plaintiff must be deemed to have understood its tenor and legal effect. Having contracted to settle all demands, the contract having been

fully executed, she cannot now be heard to say that she did not settle all demands, but that, on the contrary, she reserved the particular demand in question.

It is stated in 2 Greenl. Ev. § 28a, in the following language: "The facts in respect to the arrangement or accord between the parties being ascertained, their effect is purely a question of law, and is not to be submitted to the jury. Thus, where A. and B., having mutual causes of action in tort, and meeting for the purpose of adjusting the demands of B. only, it was insisted by the latter that A. should pay him therefor a sum of money, and give him a receipt in full of all demands, which was accordingly done, but nothing was said about A.'s cause of action, it was held that this was a good accord and satisfaction of the demand of A. against B." *Vedder v. Vedder*, 1 Denio, 257; *Donohue v. Woodbury*, 6 Cush. 148; *McDaniels v. President*, 29 Vt. 230.

The paper in question being a contract entered into by plaintiff deliberately, and with full knowledge of her rights, being sufficient in its terms to comprehend the claim in question, having been entered into for the purpose of settling all matters of difference, and being so fully understood by both parties, it is clear that its effect cannot be avoided except upon the ground of fraud or mistake. As there was no evidence upon which either fraud or mistake could be predicated, the court below properly held that the contract constituted a bar to the action. The judgment should be affirmed.

PATTISON and REED, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

Affirmed.

MR. JUSTICE ELLIOTT, having presided at the trial below, did not participate in this decision.

MARTIN ET AL. V. BOND.

EXEMPTIONS — THE STATUTE APPLIES TO MERCHANTS AND SHOP-KEEPERS.— Section 32, chapter 6C, of the General Statutes, which exempts from levy and sale on execution or attachment the tools, implements, working animals, books and stock in trade, not exceeding \$300 in value, of any mechanic, miner or other person not being the head of a family, used and kept for the purpose of carrying on his trade and business, covers and includes the stock in trade of a merchant or shop-keeper kept for the purpose of sale, to the extent specified in the statute, the same as the property of other persons.

Appeal from Pitkin County Court.

Messrs. WILSON & STIMSON, for appellants.

PATTISON, C. In this case it appears that some time prior to December 29, 1886, the appellants instituted an action against the appellee, in which they caused a writ of attachment to be issued and levied upon her property, which consisted of a stock of merchandise.

Appellee claimed that a portion of the property levied upon was exempt from levy and sale. In support of her claim she filed an affidavit in which she stated "that she is not the head of a family; that she is a *bona fide* resident of the state of Colorado, resides at Aspen, Pitkin county, in said state, and is engaged in business in said town as a merchant, dealing in confectionery, produce, fruits, poultry, game, bottled liquors, notions, etc.; that each of the writs of attachment issued in the above-entitled action has been levied upon her said stock of goods and store furniture and fixtures."

The affidavit further states that certain goods, which are particularly mentioned, "constitute a part of deponent's said stock in trade, and are used and kept by deponent for the purpose of carrying on her said business; that no part of the amount sued for in either of said actions is for the purchase price of property herein speci-

14	466
16	98
14	466
18	13
18	58
14	466
7a	156
14	466
27	126

fied, or any part thereof; that the value of said property does not exceed the sum of \$300; that said deponent claims each one and all of the articles hereinbefore specified as exempt from levy and sale under said writs of attachment, or either of them; that the plaintiffs in each of said actions deny that said property is exempt from levy and sale under said attachments. Defendant therefore demands a trial of her right to said exemption."

Upon this affidavit, supplemented by a stipulation reciting certain facts, the trial was had, and resulted in a judgment declaring that the articles of merchandise mentioned in the affidavit were exempt from execution. It was agreed and stipulated by the parties that at the time of the levy of the attachment appellee was engaged in the mercantile business, and that the value of her entire stock of goods was more than \$300; that the articles specified in her affidavit constituted a part of her stock in trade, and were kept by her for the purpose of carrying on her business, and were of the value of \$299.65, and no more. It was further agreed that appellee claimed the articles mentioned were exempt when the writs were levied, and duly demanded their return; that such demand was refused; and that no part of the amount sued for was for purchase money.

The question presented to this court is clearly and well defined. Is any part of the stock in trade of a merchant, not the head of a family, kept for the purpose of sale, exempt from execution? The question involves a construction of section 32 of chapter 60 of the General Statutes of this state, relating to judgments and executions. It is generally held by courts of last resort that exemption statutes should be liberally construed. In *Thomp. Homesteads & Ex.* § 731, the author says: "As already seen, the courts are united in the conclusion that statutes of this kind ought to be liberally construed, so as to advance the intention of the legislature. From this general view there are but one or two dissenting voices,

among which may be named the supreme court of Pennsylvania and the early supreme court of Minnesota."

The liberal policy of this state in regard to exemption laws is indicated by the organic law. Section 1 of article 18 of the constitution expressly declares that "the general assembly shall pass liberal homestead and exemption laws." The decisions of the courts should be in harmony with this policy.

In the discussion of this case it is unnecessary to recite all of the nine subdivisions of the section mentioned. It is sufficient to say that by them liberal provision is made for all heads of families; that they apply exclusively to the heads of families; that they have no application whatever to a debtor who is not the head of a family; and that the sole protection of a citizen of the latter class is to be found in the following proviso: "And provided, also, further, that the tools, implements, working animals, books and stock in trade, not exceeding \$300 in value, of any mechanic, miner, or other person, not being the head of a family, used and kept for the purpose of carrying on his trade and business, shall be exempt from levy and sale on any execution or writ of attachment while such person is a *bona fide* resident of this state."

The intent of this proviso is manifest. By it the beneficent provisions of the statute are extended to the debtors of the class mentioned. The sole question presented is whether the language of the proviso is sufficiently comprehensive to include debtors who, like the appellee, are small tradesmen or shop-keepers. If it is not, then it follows that the statute is not uniform in its application, because the great army of small merchants in the state would be entirely without protection, and no part of their property would be exempt except that specified in the thirty-first section of the statute, to wit, "their necessary wearing apparel." As there is no reason to believe it to have been the intention of the legislature to discriminate against this class of citizens, it is

clear that they should enjoy the advantages of the statute, unless excluded by its express language, or by necessary implication. The language of the proviso is sufficiently comprehensive to include merchants and tradesmen. The part to be construed reads as follows: "The tools, implements, working animals, books and stock in trade, not exceeding \$300 in value, of any mechanic, miner or other person," etc. Appellants insist that the words "or other person" are limited in their meaning by the specific words preceding, to wit, "any mechanic, miner," etc. It is claimed that these words cannot be construed in their general sense, but that by force of association with the specific words which precede them they are limited to debtors who, like mechanics or miners, earn a livelihood by manual labor as skilled artisans. If this construction should prevail, it necessarily follows that the words "stock in trade" would not apply to merchandise which is bought and sold, but must be limited to the material which the mechanic or miner may keep for the purpose of manufacturing or carrying on his business. In aid of this interpretation of the statute the familiar rule of the association of words is invoked, that "where specific terms are followed by general terms the general is restricted to a sense analogous to the specific;" the rule usually expressed by the words "*nosci-tur a sociis*." But the purpose of this rule, as of all rules of construction, is to aid in discovering and defining the intent of a statute, and is in no sense arbitrary in its character. It must, in all cases, yield to the higher principle of interpretation, to wit, that "statutes must be interpreted according to the intent and meaning, and not always according to the letter." Potter's Dwar. St. 144.

In End. Interp. § 410, it is said: "The general object of the act also sometimes requires that the final generic word shall not be restricted in meaning by its predecessors. The rule, in general requiring the opposite, is

merely an aid in ascertaining the legislative intent, and, of course, does not warrant the court in confining the operation of a statute, be it penal or otherwise, within limits narrower than those intended by the law-maker, nor require the entire rejection of general terms, but is to be taken and applied in connection with other principles of statutory construction, *e. g.*, that the declared intention of the legislature is to be carried into effect."

In *Harrington v. Smith*, 28 Wis. 43, these principles are stated in the following comprehensive language: "The true rule for the construction of statutes is to look to the whole and every part of the statute, and the apparent intention derived from the whole, to the subject-matter, to the effects and consequences, and to the reason and spirit of the law; and thus to ascertain the true meaning of the legislature, though the meaning so ascertained may sometimes conflict with the literal sense of the words." "General words in a statute must receive a general construction, unless there be something in it to restrain them, or if there be no express exception."

In *Woodworth v. State*, 26 Ohio St. 196, McIlvaine, C. J., uses the following language: "Now, it must be remarked that the rule of construction referred to above can be used only as an aid in ascertaining the legislative intent, and not for the purpose of confining the operation of a statute within limits narrower than those intended by the law-maker. It affords a mere suggestion to the judicial mind that, where it clearly appears that the law-maker was thinking of a particular class of persons or objects, his words of more general description may not have been intended to embrace those not within the class. The suggestion is one of common sense. Other rules of construction are, however, equally potent, especially the primary rule, which suggests that the intent of the legislature is to be found in the ordinary meaning of the words of the statute." *Tynan, Adm'r, v. Walker*, 35 Cal. 634.

To discover and give effect to the intention of the legislature, the statute should be read in the light of these principles. If so read, the intention that its provisions should be uniform in their application seems clear and unmistakable. All the subdivisions of the section cited, except the seventh, make provision for the heads of families, without reference to the trade or business in which they may be engaged. The sixth reads as follows: "The tools and implements, or stock in trade, of any mechanic, miner or other person, used and kept for the purpose of carrying on his trade or business, not exceeding \$200 in value." This provision, by a rigid application of the rule of *noscitur a sociis*, might be limited in its effect to persons exercising some particular trade. But this construction would not be in harmony with the spirit and intent of the legislature, as manifested in all the other subdivisions of the section, except the seventh, which is expressly confined to professional men. These subdivisions are general in language, and apply to heads of families, without reference to the particular trade, calling or business which they may follow. The merchant, if the head of a family, would be included.

There is nothing, therefore, in the general scope of the section which sustains appellants' proposition that the proviso relating to those who are not heads of families is to be limited to any particular class of debtors. Unless, therefore, the language of the proviso has the effect of excluding the merchant, he must be held to be included within its provisions. That its language cannot have this effect is clear. The articles enumerated are practically the same as those mentioned in the other subdivisions, except the furniture, the animals, food, supplies, etc., ordinarily kept by the head of a family. These articles are "tools, implements, working animals, books and stock in trade." This description of exempt property is quite broad enough to show that it was the intention of the legislature to extend to this class of debtors

the same protection that is afforded by the statute to heads of families. And this intention is manifested as well by the description contained in the proviso of the persons who are declared to be entitled to its benefits — “mechanics, miners or other persons.” That these general words may include the merchant cannot be doubted, and, inasmuch as the entire statute reveals an intention on the part of the legislature to protect all citizens alike, effect should be given to such intention by extending its provisions to the shop-keeper as well as the mechanic.

In the case of *Watson v. Lederer*, 11 Colo. 577, the position of appellants was stated by BECK, C. J., in the following language: “For the appellant it is urged that the appellee does not come within the class of persons herein specified, for the reason that he is neither a mechanic nor a miner, and for the further reason that the words ‘or other person’ limit the benefits of the provision to persons of like business as those named, according to the maxim *noscitur a sociis*, which excludes the plaintiff from the protection of the statute, its language not being descriptive of the business in which he was engaged. Appellant’s counsel contends that, in order to entitle a person to exemption under the designation ‘other person,’ he must follow a trade or business of the same class or kind as a mechanic or miner, and must earn his livelihood by his manual labor as a skilled artisan or handicraftsman. We are of the opinion that the statutory provision in question is not capable of such a narrow construction, and therefore cannot adopt it.” In that case it was held that “the horse, wagon and harness of an unmarried man, engaged in the business of assaying and sampling ores [and necessarily used in the prosecution of his business], are exempt from execution, under the proviso at the end of General Statutes, section 32, page 602, that the tools, etc., of a mechanic, miner or other person, not exceeding \$300 in value, shall be exempt from levy and sale.”

The particular question here presented was expressly excepted in the case cited. The court said: "It appearing, then, that provision is made in the several subdivisions comprising the body of the act for the skilled and the unskilled, the learned and the unlearned, and these several subdivisions being grouped together in a single sentence in the proviso, the application thereto of the maxim *noscitur a sociis*, instead of limiting its provisions to skilled labor only, extends them to the members of all lawful avocations who earn their livelihood by their own exertions, whether manual or mental, and who necessarily use, in the due prosecution thereof, specific articles of personal property of like character with those specified in the statute. This does not include articles of merchandise; and no opinion is now expressed concerning the import of the term 'stock in trade' as used in the statute." The learned judge was careful not to express an opinion as to "merchandise," and equally careful not to say anything which might tend to exclude the "stock in trade" of a merchant from the operation of the statute under consideration.

The corresponding provision of the statute of Kansas is as follows: "The necessary tools and implements of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business, and, in addition thereto, stock in trade, not exceeding \$400 in value." Gen. St. pp. 473, 474, § 3.

In *Bequillard v. Bartlett*, 19 Kan. 382, it was held that "this provision did not include articles of merchandise bought by a merchant to be sold again on speculation." But in the same case it was held that watches and jewelry manufactured by a watchmaker and jeweler, whether manufactured for a particular customer upon special orders, or for customers generally, and for sale to any person who might wish to purchase, whether completed or not completed, are exempt from levy and sale. It is difficult to see upon what principle the stock of the

watchmaker, who manufactures his watches for sale, is to be distinguished from that of the jeweler, who, in addition to the manufacture of watches, may purchase them and keep them for sale. In the one case, the watch made by the watchmaker for sale would be exempt from execution, while the watch bought by him for sale would not be exempt. So nice a distinction is hardly consonant with the elementary principle of construction that exemption statutes should be construed liberally.

The question was directly involved in the case of *Grimes v. Byrne*, 2 Minn. 72. The language of the statute of that state is the same as that of Kansas. It was held that the stock of a merchant was not exempt from execution. But in Wisconsin a different construction prevails. In *Wicker v. Comstock*, 52 Wis. 315, it was held that "the statute which exempts from execution 'the tools and implements, or stock in trade, of any mechanic, miner or other person, used or kept for the purpose of carrying on his trade or business, not exceeding \$200 in value,' held to apply to the stock of goods kept on sale by a merchant." In the course of the opinion Lyon, J., says: "Looking through these statutes, we find no adequate provision in favor of merchants or shopkeepers as a class, unless it is contained in the statute under consideration. Their little stocks in trade may be as indispensable to the support of their families as are the tools of the mechanic or miner, the press and types of the printer, or the library of the lawyer. Why should they not have the same protection as the others? And, when we find language in a statute which may fairly be construed as giving them the same protection extended to other classes of debtors, why should not that construction be adopted?"

There is no reason to be found, either in the letter or the spirit of the statute, or in the general policy of the law of this state, as expressed in the constitution, why the construction which prevails in Wisconsin should not

be adopted by this court, and the statute held to apply to the merchant or shop-keeper as well as the mechanic. The judgment should be affirmed.

We concur: REED and RICHMOND, CC.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

Affirmed.

AYRES ET AL. V. SHIELDS.

APPEAL — OBJECTIONS NOT RAISED BELOW. — When there is sufficient legal evidence to support the judgment it cannot be disturbed upon appeal because joint and several demands were improperly commingled at the trial, no objection for this reason having been interposed.

Appeal from La Plata County Court.

Mr. D. W. AYRES, for appellants.

Mr. H. GARBANITI, for appellee.

MR. JUSTICE HAYT delivered the opinion of the court.

In the month of March, 1883, appellee made a written lease with appellant D. W. Ayres of a certain dairy ranch, with fixtures, belonging to appellee, and situate in La Plata county, in this state. By the terms of this lease the said D. W. Ayres was to pay the sum of \$50 per month for the period of five months for the use of said property, the rent to be paid monthly at the end of each month. Ayres went into possession under the lease upon the 1st day of the following month of May, and continued to hold such possession until some time in the following month in July, at which time, the rent not having been paid as per the terms of the written agreement, Shields declared the lease forfeited, and again

went into possession; the property having been returned to Shields by a son of Ayres during the absence from the ranch of the latter.

For the rent for the months of May and June, appellant executed and delivered to appellee written obligations signed by himself and wife, in which the faithful carrying out of the agreements of said lease by Shields was expressly made a condition to the payment thereof. One of these instruments, by its terms, fell due upon the last day of May, and the other on the last day of June, 1883. Upon June 19th appellants paid \$10 upon the first of these instruments, and upon July 3d made a further payment of \$14. These were the only payments that had been made at the time suit was brought. Appellee instituted this suit for the balance due upon these written instruments, also including in his demand certain other sums claimed to be due him from D. W. Ayres for various articles which he claimed to have furnished the said D. W. Ayres at the latter's special instance and request. Defendants claimed a breach in the conditions of the lease on the part of appellee, and damages therefor.

The case was commenced before a justice of the peace. The trial before that officer resulting in a verdict for appellee, appellants brought the case into the county court by appeal. A jury having been expressly waived in the latter court, the case was tried to the court. This trial resulting in a judgment for Shields in the sum of \$76, the case is brought here by appeal.

Upon the trial in the county court both parties were allowed, without objection, to introduce testimony concerning a number of unsettled transactions between them. By the testimony of appellee, it was shown that D. W. Ayres was indebted to him in the sum of \$35 for ice, \$2.50 for wagon hire, \$8.64 for milk bottles, \$14 for a butter-worker; making a total of \$60.14 for those items, in addition to the amount claimed to be due upon

the written instruments, which were also introduced without objection.

On the part of appellants, evidence was received tending to show that appellee had not complied with the terms of the written lease, and going to show that appellant had been greatly damaged by such failure, all of which was disputed by witnesses called by appellee, and by appellee himself, who was sworn as a witness in his own behalf. Upon the evidence the trial court rendered judgment in favor of appellee for the sum of \$76, but we are not advised by the record, and have no means of ascertaining, what items went to make up this sum.

Appellants did not object at the trial to the commingling of joint and several demands, and do not do so now. All the evidence offered by either party was admitted without objection; and, upon the record presented, we cannot say that the judgment is not warranted by the evidence. It must therefore be affirmed.

Affirmed.

WILLIAMS ET AL. V. CARPENTER.

14	477
80	333

1. **LEGAL AND EQUITABLE REMEDIES — ACTION FOR DELIVERY OF TITLE DEEDS.**— Where the principal ground of relief demanded by an action is the delivery of title deeds, muniments of title, or other written instruments, the value of which cannot with reasonable certainty be estimated, or where by reason of the insolvency of the defendants an action at law would not afford a full, adequate and complete remedy, an equitable action may be maintained.
2. **ILLEGITIMATE DEFENSE — ONE MADE BY A PARTY NOT ENTITLED THERETO, OR MADE AFTER WAIVER OF THE OBJECTION RELIED ON.**— It is no defense to an action for the delivery of title deeds, after payment and acceptance of the purchase money, that the contract of sale was not in writing, and was therefore void. One to whom the title papers have been intrusted for delivery to the purchaser can in no event interpose such a defense to the action.

Appeal from Superior Court of Denver.

THIS suit was instituted by appellee M. B. Carpenter, plaintiff, against appellants Joseph and Anna Williams and one Alfred J. Ware, as defendants. The gist of the complaint is that Jerome B. Chaffee, having acquired title to an undivided one-fourth interest in and to certain mining properties in this state through the foreclosure of a trust-deed made by defendant Ware, to secure the payment of his note of \$2,000 and interest to appellant Joseph Williams and two others, on the 14th of July, 1885, agreed to sell the same to the appellee Carpenter, on condition that he paid or deposited \$2,500 to the credit of said Chaffee in the First National Bank of Denver on or before August 14, 1885; that said Chaffee, on the same day, made a quitclaim deed of the premises and placed it in the hands of his attorney, L. B. France, instructing him to deliver it, together with Ware's trust-deed and note, to appellee, upon compliance with the conditions of payment; that appellee made the deposit of \$2,500 to the credit of said Chaffee in said bank upon the 14th day of August, 1885, and that afterwards Chaffee drew out the money so deposited, and appropriated the same to his own use; that appellant received from said bank a certificate showing such deposit, and exhibited the same to France, and demanded the deed and other papers; that France refused to deliver them until a claim made by Williams upon Ware should be settled, and thereupon appellee agreed with the defendant Joseph Williams that the deed of Chaffee and the trust-deed and note should be turned over by said France to Joseph Williams, to be held by the latter a reasonable time to enable Williams to effect a settlement with Ware of certain controversies then existing between them; that the papers were delivered by France to Williams in pursuance of said agreement, and that Williams accepted and retained the same "upon the express condition that the same should be

turned over to the plaintiff upon the payment to him, the said Williams, of his claim or demand upon said Ware, in case it should appear that the said Ware was indebted to the said Williams." It is also averred that neither Williams nor Ware have made any effort to effect a settlement, although often requested so to do by appellee, but have allowed an unreasonable time to elapse since the notes and deeds were so deposited with Williams without any attempt at such settlement; that Ware was not at the time of said deposit, and is not now, indebted to Williams; that said Williams claims that the papers are now held by the defendant Anna Williams, and that both said defendants refuse to deliver them to plaintiff, although often requested so to do; that they, and each of them, are insolvent and unable to respond in damages to the appellee for wrongfully withholding the delivery of the papers; and that Chaffee has died since they went into the hands of Williams.

The defendant Ware made default. The defendants Joseph and Anna Williams joined in an answer, denying the agreement set out in the complaint, and alleging that at the date of Ware's note appellants Joseph Williams, Charles S. Abbott and John Sanderson were mining on the premises under a license from Ware, the sole owner of the properties, and that Ware, being pressed for money to save the same from a forced sale, applied to Williams for a loan of \$2,000, offering to him as an inducement one-fourth of the proceeds of a sale of the whole property, when the same could be sold, in consideration of which Williams loaned the \$2,000, taking Ware's note and the trust-deed on one-fourth interest in the properties; that Williams assigned the same to Jerome B. Chaffee, from whom he had borrowed the \$2,000, as his security for the money. It is also alleged that Chaffee held the title derived through the foreclosure for the benefit of Williams in accordance with the arrangement made with Ware at the time of the loan, and that this was one of the conditions of the sale by

Chaffee to appellee. Defendants further aver that the payment or deposit of \$2,500 and the settlement of said Williams' claim were to be made within thirty days from the 14th day of July, 1885, and that the quitclaim deed of Chaffee was left with his attorney, L. B. France, to be delivered to the appellee only upon condition that the payment or deposit and settlement were made within said thirty days; that appellee did not pay or deposit the said \$2,500, nor settle the claim of said Williams, within the thirty days; that after the thirty days appellee demanded the deed and papers of France, who refused to deliver them, for the reason that Williams' claim had not been satisfied; that thereafter France, with the consent of appellee, turned the papers over to Williams to be held by him as his own security for the satisfaction of his claim under the arrangement with Ware; that his claim has not been satisfied or released; and that the appellant Anna Williams holds the papers as a marriage gift from Joseph Williams of his interest in the properties.

Upon these issues the case was tried to the court. As the result of such trial the issues were found in favor of appellee, and judgment was entered accordingly, requiring the defendants Joseph and Anna Williams to immediately surrender and deliver up to the plaintiff the said deed of Chaffee and the note of Ware which were then in the possession of and under the control of the defendant Anna Williams. Judgment was also given the plaintiff for costs, and an order made that execution issue therefor. Appellants bring the case here for review upon appeal.

Mr. J. A. BENTLEY, for appellants.

Messrs. M. B. CARPENTER and C. W. WRIGHT, for appellee.

HAYT, J. It is contended by appellants that if upon the facts stated in the complaint appellee is entitled to

any relief whatever, it is not the relief decreed by the court below. As we understand his position, it is that if appellee is entitled to the deed of his property, his action should have been in the nature of replevin, rather than the equitable action pursued in this case. Since this case was decided below the cause of *Henderson v. Johns*, 13 Colo. 280, has been determined by this court. It was there held that the remedy at law which defeats an action in equity must be full, adequate and complete, and that equity will, at the suit of persons legally entitled to them, decree the delivery up of deeds and other instruments in writing, since damages are inadequate, and the legal actions for the recovery of possession are incomplete.

In the case at bar the insolvency of each of the defendants is alleged and proved. Under our practice, an action for claim and delivery is substituted for the common-law action of replevin, and the judgment must be for the return of the property, or, in the alternative, for the value thereof, in case a delivery cannot be had. Under the circumstances disclosed in this case, the alternative judgment provided for by statute would be of no avail. The practice in equity of compelling the delivery to the lawful owners of deeds and other written instruments of title rests upon sound reason, and is well supported by authority. 1 Pom. Eq. Jur. § 184 *et seq.*, and cases cited. In section 185 the writer says: "Where the final relief is substantially a recovery of chattels, the jurisdiction embraces suits to compel the restoration or delivery of possession of specific chattels of such a peculiar, uncommon or unique character that they cannot be replaced by means of money, and are not susceptible of being compensated for by any practicable or certain measure of damages, and in respect of which the legal actions of replevin, detinue or trover do not furnish a complete remedy. This particular exercise of the jurisdiction extends, for a like reason, to suits to compel the delivery of deeds, muniments of title, and other written

instruments, the value of which cannot, with any reasonable certainty, be estimated in money."

If plaintiff has shown a clear right to the deed in controversy, we think his right of recovery cannot be defeated, for the reason that he has resorted to an action in the nature of a suit in equity, and not an action at law.

This brings us to the consideration of the merits of the case. The court below found that the allegations of the complaint were established by the evidence, and that the matters set up by way of defense were not proven. These findings seem to be fully supported by the evidence. It is said, however, that the agreement between Carpenter and Chaffee was in reference to an interest in lands, and therefore void, for the reason that it was not in writing. Under the circumstances, this is a matter of no consequence. Chaffee, the only party entitled to make this objection, did not interpose any objection to the delivery of the deed for this reason, and the only objection made to such delivery by Mr. France, the attorney and agent of Mr. Chaffee, grew out of the claim advanced by Chaffee's friend Williams. Whether or not France should have refused to deliver the deed for this reason is unimportant, as this claim of Williams' was arranged satisfactorily to both Williams and Carpenter; and thereupon France delivered the deed to Williams with the express understanding and agreement that Williams was to hold the same only for the purpose of effecting a settlement with Ware, when the deed was to be delivered to appellee. At the time of the trial, although more than two years had elapsed since the papers were delivered by France to Williams, the latter had made no effort to effect a settlement with Ware. In addition to this, the evidence shows, and the court below found, that Ware was not indebted to Williams. Under these circumstances, we think the decree of the court below was right, and should be sustained.

The heirs at law of Chaffee are in no way interested in this controversy, and were certainly not necessary parties to the suit. Chaffee, in his life-time, parted with his entire interest in the property, and received the consideration therefor. *Great West. Min. Co. v. Woodmas of Alston Min. Co.* 12 Colo. 46. The judgment must be affirmed.

Affirmed.

COOK v. DOUD.

1. JURY TRIAL — ARGUMENT OF COUNSEL. — Counsel, in argument before the jury, may not comment upon matters of fact that are not in evidence. Subject to this general rule trial courts should, in the exercise of a reasonable discretion, favor the freest and fullest discussion.
2. WAIVER OF OBJECTIONS — PRACTICE IN SUPREME COURT. — When opposing counsel refrains from objecting at the time to improper argument, and the trial court afterwards refuses relief, reviewing tribunals, invoking a rule analogous to that of estoppel, frequently decline also to interfere.
3. MOTIONS FOR NEW TRIAL — DISCRETION OF TRIAL COURTS. — Trial courts are vested with a large discretion in determining motions for a new trial, and, unless there be an illegal exercise of such discretion or a clear abuse thereof, appellate courts refuse to interfere.
4. SAME — COMMENTS OF COUNSEL ON THE ABSENCE OF EXCLUDED EVIDENCE. — Where, in action for assault, evidence as to the relations of the parties prior to the assault has been excluded, it is within the discretion of the court to grant a new trial on account of remarks of defendant's counsel commenting on the absence of such evidence, and intended to prejudice the jury against plaintiff by producing the impression that there was great provocation to the assault.

Appeal from District Court of Arapahoe County.

DEFENDANT, COOK, sent word to plaintiff, Doud, that a party wished to speak with him at a certain hotel in the city. Plaintiff repaired to the place appointed and was immediately assaulted by defendant, in the presence of

14	483
16	480
14	483
17	500
17	563
14	483
19	422
14	483
20a	88

several by-standers, with a raw-hide riding-whip, receiving blows upon the head, shoulders, face and back. Plaintiff clinched with defendant. A short struggle ensued, when plaintiff was thrown to the floor and there held by defendant until others interfered and put an end to the affray.

It is unnecessary to embody anything further in the statement of facts, save the following extracts, which form the basis of the opinion, from the argument of Mr. Patterson, counsel for defendant in the court below:

“Gentlemen of the jury: As I suggested in the opening statement, no man of ordinary, common experience in the affairs of this world will hesitate to conclude but that there was an antecedent to that affair; and, although it is the law in this state that we should not be permitted to show what that antecedent was, I will always believe that it should be the law, and, if it is not, then a law should be made. * * * It seems to me, gentlemen, that, if counsel for plaintiff in this case desired to secure for him a large roll of greenbacks, as a poultice to his wounded feelings, out of the pocket of Mr. Cook, that these men would have said, when we offered to show what transpired upon the part of the man towards Cook before the happening of this affair,—they would have said: ‘Yes, if there is anything.’ * * * And, therefore, gentlemen of the jury, I have a right to say, as I do say, that it would have been more manly if, instead of these gentlemen constantly saying, ‘I object, I object, I object,’ when we offered to prove the relation that existed between the parties before the morning of the 10th of May, if they had said: ‘Yes, we feel that Mr. Doud was without fault in this matter, and we have no objection to having his conduct investigated, and everything in connection with this transaction laid bare.’ But, gentlemen of the jury, they did not see fit to do it, and, presenting Mr. Doud before you in this way, they say to you that they expect you to commence on the morning

of May 10th; that they do not propose to have you investigate for a single moment any act or course of conduct on the part of Mr. Doud towards Mr. Cook before that time. * * * I say, gentlemen of the jury, that, when they come into court in this light, they come into court under false pretenses. They attempt to make the jury believe that their client was without fault; that it was, in the language of the attorney who addressed you, a brutal and unprovoked assault. Yet at the same time, when we offered to lift the veil for the purpose of showing what preceded it, they object, and the court sustained them; and, in the face of this record, they say you must go on the theory that Doud was blameless, as guiltless as an infant, and has done nothing whatever to warrant this assault upon him. I say that sort of an argument and that sort of procedure is a fraud upon the jury, and a fraud upon the court, and should have no influence upon the jury except to induce them to turn their faces against a proposition that is as bald and unwarrantable as this. * * * No, gentlemen of the jury. To my mind, this is as evident and plain a transaction as ever passed before my mental vision,—the conduct of this man, goading Mr. Cook on to the step that he took. * * * How are you to determine how this man's feelings were injured? How do you know anything about them? They would not let us prove anything about them. * * * He does not come before you honestly. He did not present his case to you in a friendly way. He does not lift the curtain, and let you see his inside. He does nothing but smuggle himself in. He says: 'I claim the protection of the law, and will not let the jury see anything that antedated this affair on the 10th.' * * * Talking about the indignities that have been heaped upon a member of the legal profession, I do not believe that a scheme of this sort could win. In view of the fact, gentlemen, that they themselves closed the door to investigation, that they themselves put a bar across the

entrance, that they themselves refused to allow this jury to know what the course of conduct of this man Doud towards Cook has been; to say whether or not this was a case in which he was driven by persecution to show his displeasure, and to give this man to understand that a better course of conduct would be better for him in the future. One of the witnesses said that Cook said to him: 'If you promise to behave in the future, I will let you up.' Another said he declared this man had cheated him out of \$500. Another of them said that Mr. Cook said he would not be hounded by any cur of a lawyer, and scarcely a word of protest out of the mouth of this man Doud. It shows that there is something behind it and around it that these people are closing out, and they want to get a verdict upon a mere technicality; and that would be a disgrace to justice, if the true relation of these men could be made to appear. * * * The court says that you, gentlemen of the jury, are the sole judges of what this amount should be; and I have no hesitation in saying, from what has crept out,—the declarations of Cook at the time, charging this man with pursuing and persecuting him, the fact that they must shut the door, and put a bar across the entrance so that you could not see what the real matter was,—all go to justify me in asserting that one cent would be ample damages, because it carries with it the heavy expense of this trial."

Messrs. PATTERSON & THOMAS, for appellant.

Mr. A. L. DOUD, *pro se*.

CHIEF JUSTICE HELM delivered the opinion of the court.

The present action is for damages growing out of an assault and battery. The case was tried to a jury, and a verdict was returned in favor of plaintiff for the sum of \$200. Upon motion for a new trial this verdict was set

aside, and thereupon defendant prosecuted the present appeal under the statute of 1885, no longer in force.

At the trial the court below excluded all evidence offered to show antecedent business transactions between plaintiff and defendant. Notwithstanding this ruling, however, counsel for defendant, in his address, repeatedly referred to these transactions, and endeavored to impress upon the jurors' minds the idea that defendant acted under such strong provocation as to justify a verdict for one cent only. In vacating the verdict returned the following language was employed by the court:

"I think that the opinion of the supreme court should be had on this method of addressing the jury; and I grant a new trial in this case freely, without any hesitation, on the sole ground that counsel, in addressing the jury, should confine themselves to the testimony, and not by innuendo or indirection seek to place before them matters which the court has expressly, by its rulings on the introduction of testimony, said were not proper."

We cannot say that the court's action in granting a new trial should be sustained upon either of the remaining grounds stated in the motion. Our examination will, therefore, extend only to the matter above specified as the basis of the ruling made. If counsel for defendant was guilty of misconduct in argument, whereby the jury may have been induced to consider circumstances not before them, and thus to reduce the damages they would otherwise have given, unless some technical objection forbids, the order under consideration should be sustained.

It is impossible to give in advance special directions for the guidance of attorneys in the discussion of evidence. An attempt to do so would unwisely limit the attorney's privilege on one hand, or embarrass the due administration of justice on the other. This is a matter that must of necessity be left largely to the reasonable discretion of trial courts, and to a certain extent be gov-

erned by the circumstances attending the particular proceedings in progress. The general rule, however, that counsel may not comment upon matters of fact that have not been admitted in evidence, and that their arguments must in this respect be confined to the record, has received universal approval. But great embarrassment is often encountered in determining just where the line exists between those inferences that counsel may draw from evidence before the jury, and the suggestion of substantive matters that are wholly outside the record. The disposition of courts has been, as it doubtless should be, to recognize a generous license in the premises, and to resolve serious doubts in favor of the freest and fullest discussion.

Counsel in the present case refrained from naming expressly any facts or circumstances not in the record, but he accomplished the same result by adroitly insinuating the existence of such facts and circumstances. He labored throughout his argument to impress upon the minds of the jurors the belief that back of the affray there existed a state of affairs which justly enraged defendant, and led him to make the assault. Without declaring that the court committed error in excluding evidence of the antecedent business relationship of the parties, he skilfully directed the attention of the jurors to this relationship, and persistently insisted that the conduct of plaintiff — whatever it may have been — was such as to excuse in large measure, if not to justify, defendant's assault. It is impossible to read this argument without being impressed with the belief that counsel may have obtained for his client even a greater advantage than the admission of the excluded testimony would have produced.

It is not contended that the court's ruling rejecting this testimony was error, and we do not perceive any legal excuse for making its absence a subject of repeated reference and comment. If it was not proper for the

jurors to have before them the prior acts of the parties, it was certainly not competent for counsel to persistently urge that the verdict should be influenced thereby. If the jury were not entitled to judge of the assault in the light of the facts constituting the alleged provocation, counsel was not entitled to constantly remind them of such provocation, and insist upon its supposed aggravated nature, in reduction of damages.

This is not analogous to the cases cited, where comment was permitted and damaging inferences were allowed to be drawn from the failure of the adverse party to produce competent evidence of importance, apparently within his reach.

The epithets employed by defendant, and mentioned by witnesses in describing the assault, furnished no legal foundation for counsel's remarks. They were uttered in the heat of passion, and, had punitive damages been allowable, would have been pertinent to augment the recovery. As it was, however, they could perform no office save possibly to aggravate the public contumely of the assault, and thus increase the measure of plaintiff's compensatory indemnity. The jurors were expressly forbidden by the charge from considering any "circumstances previous to the preparation for the assault." The utterances of defendant at the time were almost necessarily detailed as a part of the *res gestæ*; but, in so far as they might be supposed to point to a possible provocation arising out of past business transactions, they could have no effect upon the verdict. Counsel had no more right to employ the epithets in question as a basis for his innuendo of provocation than to insist, as he did, that the mere fact of the assault being made conclusively implied the existence of such provocation, and warranted the jury in considering the same upon the apportionment of damages.

The proposition is urged, however, that, since no exception was preserved during the progress of the argument, the court's action in granting a new trial was a

fatal error. The attention of both court and counsel should undoubtedly be drawn to such objectionable conduct by immediate protest. Under the impulse of exciting cases, attorneys sometimes inadvertently pass beyond the pale of legitimate argument; but, attention being at once called to the matter, proper amends are made, and harmful results avoided. Occasionally opposing counsel intentionally refrain from objection, hoping to secure some unfair advantage, either in closing the case or in the court of review, through the misconduct in this respect of opponents. It is obvious that when, under such circumstances, this purpose is not accomplished, the tardy objection by motion for a new trial should be regarded with no special favor. Hence it is that reviewing tribunals have sometimes applied to such cases, *when the trial court refused relief*, a rule analogous to that of estoppel. *Powers v. Mitchell*, 77 Me. 361; *Knight v. Hough-talling*, 85 N. C. 17; *Davis v. State*, 33 Ga. 98.

But, as already suggested, *nisi prius* courts are necessarily vested with a large discretion in passing upon motions for a new trial. This discretion must not be arbitrarily or illegally exercised, but discretion, however limited, involves some independence of judgment; and, in determining whether or not certain alleged misconduct could have prejudiced the opposite party, those courts have advantages not possessed by reviewing tribunals. For these reasons, unless there be an illegal exercise of discretion, or a clear abuse thereof, appellate courts decline to interfere.

Moreover, trial courts themselves are not entirely free from responsibility under circumstances like those here presented. Improper conduct before them, however manifested, should be rebuked and repressed. And no case has been cited which holds that the mere silence of opposing counsel estops the court from granting relief by a new trial when the rights of litigants have been prejudiced through misconduct in argument.

It is a fact worthy of notice that in the present case

objection *was* interposed during the argument, though no ruling was obtained, and no exception was taken. It is, therefore, not true that counsel, owing to enthusiasm or excitement, remained unconscious of the impropriety he was committing.

We cannot say that the district court abused, or illegally exercised, its discretion in the case at bar, and its action will be treated as controlling. The order appealed from is affirmed.

Affirmed.

CAMPBELL V. SHILAND.

1. CODE PLEADING — UNITING SEVERAL CAUSES OF ACTION IN THE SAME COUNT.—At common law the pleader might unite in one count several *indebitatus assumpsit* counts relating to the same subject-matter; and when the same course is pursued under the code, a general demurrer, when either count is good, must be overruled.
2. COMMON-LAW FORMS SUFFICIENT UNDER CODE AS TO ALLEGATIONS OF FACT.—A count in *indebitatus assumpsit*, framed substantially as required at common law, sufficiently complies with the code mandate as to allegations of fact.

Appeal from District Court of Arapahoe County.

Mr. J. W. VROOM, for appellant.

Mr. EDGAR CAYPLESS, for appellee.

CHIEF JUSTICE HELM delivered the opinion of the court.

It is conceded in the argument of this case that, upon motion to make the complaint more definite and certain, the court below ordered a bill of particulars to be filed. The record shows that thereupon a general demurrer challenging the sufficiency of the complaint was presented and overruled. From the order thus made the

14	491
16	508
14	491
19	268

present appeal was taken under the act of 1885, and the sole matter presented for adjudication may be resolved into the inquiry, Does the complaint state a cause of action?

The pleader evidently endeavored to unite in one count four or five of the common-law counts in *indebitatus assumpsit*, all of which, however, related to the same subject-matter. This course was allowable at common law, and, though hardly to be commended, is not obnoxious to a general demurrer under the present practice. A count in *indebitatus assumpsit*, framed substantially as required at common law, is now held to be a sufficient compliance with the code mandate as to allegations of fact. *Gale v. James*, 11 Colo. 540; *Allen v. Patterson*, 7 N. Y. 476; *McManus v. Mining Co.* 4 Nev. 15; *Grannis v. Hooker*, 29 Wis. 65; *Meagher v. Morgan*, 3 Kan. 372; *Wilkins v. Stidger*, 22 Cal. 232; *Ball v. Fulton Co.* 31 Ark. 379; Bliss, Code Pl. (2d ed.) §§ 298, 299.

This position is more easily reconciled with the underlying principle of code pleading, because of the provision (Civil Code, § 63) which excuses setting forth in the first instance the items of an account, requiring, however, the delivery of a copy thereof upon demand therefor. Bliss, Code Pl. § 299, *supra*.

If, therefore, in the present case, any one of the counts which plaintiff attempted to plead would be sufficient at common law, *so far as allegations of fact are concerned*, the complaint states a cause of action, and the demurrer was properly overruled.

Among other things, this pleading avers, substantially, that defendant is indebted to plaintiff for money paid, laid out and expended by plaintiff between December 6, 1879, and December 20, 1883, for the use and benefit of defendant, and at his special instance and request, in the sum of \$11,476.07; that said sum is due, but defendant has not paid the same, nor any part thereof.

The complaint is not framed in the precise language

employed by common-law pleaders; nor does it allege the legal inference that defendant, by virtue of the premises, "promised," etc.; but it will be observed that no material averment of *fact* is wanting to constitute a good common-law declaration for "money expended."

Therefore, without analyzing or commenting upon the remaining portions of the pleading in question, we shall hold that the action of the court below in the premises was not error, and the judgment is accordingly affirmed.

Affirmed.

MR. JUSTICE ELLIOTT, having presided as district judge at the trial of this cause, did not participate in its consideration in this court

WIER V. JOHNS.

14	498
9a	514
14	498
28	512

1. **EQUITABLE INTERVENTION NOT ADMISSIBLE — ACTS OF A PARTY TO A CONTRACT AGAINST WHICH A COURT OF EQUITY CANNOT RELIEVE.**— Where a party has the means of acquiring full information respecting the nature and extent of the obligations he is about to assume in the execution of the contract, and ample time to acquaint himself therewith, in the absence of fraud or imposition by the other party to the contract, a court of equity cannot relieve him against over-generous, hasty and inconsiderate action on his part, however ill-advised and injurious to his interests they may be.
2. **A BILL TO SET ASIDE A CONVEYANCE OF LAND DONATED WILL NOT LIE IN THE ABSENCE OF FRAUD OR MISTAKE.**— On a bill to set aside a conveyance, it appeared that plaintiff had agreed to donate to defendant land, in consideration of his erecting a factory upon it. There was a dispute as to whether the tract to be donated was to contain ten or twelve acres; and to settle the question as to the quantity necessary for the purpose intended, a surveyor was procured, and four separate parcels were surveyed and platted, showing the portions thereof which would be required for streets, and the parts occupied by the channel of the Platte river. After some negotiation the defendant offered to accept, and the plaintiff agreed to execute a deed to him of all four parcels. Plaintiff assisted in the survey and could easily have ascertained exactly how many acres the tracts contained. Before executing the convey-

ance, and after the tracts had been platted, he was informed that they contained considerably more than ten acres. Under this state of facts no case existed authorizing a court of equity to decree a cancellation of a portion of the conveyance, or for other relief.

Appeal from District Court of Arapahoe County.

Messrs. J. P. HEISLER and BENEDICT & PHELPS, for appellant.

Messrs. DOUD & FOWLER, for appellee.

REED, C. Appellant, plaintiff below, on the 1st of May, 1889, was, and for a long time previous had been, the owner of a tract of land near the city of Denver, and, being desirous of encouraging manufactures and enhancing the value of his land, entered into a contract with appellee whereby appellant was to donate and deed a tract of land to appellee in consideration of his building and maintaining on some part of the land quite an extensive factory for the manufactory of carriages. The contract in the first instance was for the donation of a tract ten acres in extent. Afterwards it was increased, and was to be twelve acres. After that, and before a conveyance was made, a question arose between the parties in regard to the extent of the tract; appellant insisting it should not exceed ten acres. In order to arrive at the proper conclusion a surveyor was employed by the appellee; and, with the assistance of appellant, a survey was made of four different parcels, conforming to the Platte river, and to streets to be laid out for the subdivision of the property. After some negotiation, appellee expressed a willingness to take the four tracts in full satisfaction, which seems at the time to have been acquiesced in by appellant, but, as alleged, under a mistake as to the aggregate quantity embraced in the four parcels; he supposing it did not much, if any, exceed ten acres in extent. A plat was made of the surveyed area,

showing streets, size of blocks, courses, distances, etc. According to the evidence the four tracts aggregated about thirteen and fifteen one-hundredths acres, exclusive of streets and the river, for which appellee requested a deed, which was made and executed, describing the tracts by courses, distances, metes and bounds, but not designating the number of acres. The deed was delivered to appellee, who executed and delivered a contract to erect a factory.

On the 29th of May, 1889, appellant commenced this suit by filing a complaint alleging his contract to convey ten acres and no more, the making and delivery of the deed by which, as alleged, he conveyed a fraction over fourteen acres; averring that the deed was by him executed under a misapprehension of the amount of land, and by mistake, and obtained by appellee through fraud and concealment of the facts; that the land donated and conveyed was worth \$2,000 an acre, for which he received no consideration except the proposed erection of the factory; and asking that the deed be canceled and held void, that the description in the deed be corrected so as to embrace the proper amount of land, that the defendant be required to reconvey to plaintiff all land conveyed in excess of the ten acres, and for an injunction restraining the defendant from selling or incumbering the land. A trial was had to the court, resulting in a judgment for the defendant.

Several errors are assigned, but those relied upon are, in substance, that the finding was against the evidence and the law. Much testimony was taken in regard to the original and subsequent contracts of the parties as to the amount of land to be conveyed, which need not be considered by this court, as it appears that such contracts had expired by limitation, or had been superseded, and that, at the time of the survey and attempted designation and final adjustment of the matter, there was no definite understanding between the parties either as to

quantity — whether ten or twelve acres — or location; and, as all former negotiations must be regarded as leading up to, and having been merged in, final adjustment, much of the testimony may be disregarded except in so far as it explains the intention of appellant as to the amount of land he was to convey.

The only question necessary to be determined is whether appellant was overreached by fraud and concealment on the part of appellee, and, through misapprehension of the facts or by mistake, conveyed more land than he intended, and the other had a right to require.

It is apparent from the evidence that appellant was, in the transaction, generous in the extreme, conveying a very large and valuable property for apparently a very inadequate consideration, and conscientiously carrying out an oral agreement when it could not have been enforced, perhaps, at law. It is equally apparent that appellee was selfish and exacting. But these are matters outside of the limit of proper examination in this court. A court of equity cannot relieve a party from the effects of generous, hasty or inconsiderate acts entered upon understandingly, however ill-advised and injurious they may be. It appears from all the testimony, including that of appellant, that he assisted in the survey, designated different points and courses, and had the survey made with a view to having it coincide with the intended platting of the remainder of the tract, and that this was all done as preliminary to determine what parcels, and how much, appellee should have. It also appears that, after these preliminary facts were ascertained, it was agreed between the parties that the four parcels should be conveyed and accepted, concluding the transaction.

It does not conclusively appear that appellant was definitely informed of the contents of each parcel. The contents of the two westerly blocks, and the triangular piece on the east side of the river, seem to have been properly ascertained and truly stated to the appellant;

but it does not conclusively appear that he was properly or definitely informed of the amount of land contained in the other tract adjoining the river on the westerly side. But there is no evidence of concealment of the fact by appellee or the surveyor, while it is conclusively shown that appellant had, or could have had, all necessary information and *data* to arrive at exact knowledge of the quantities, had he deemed it necessary. These facts, of themselves, might be deemed sufficient to warrant a court of equity in refusing to interfere, but there are still stronger reasons for refusing the relief asked.

After the survey was completed a plat was made, showing boundaries, courses and distances, from which the contents of each tract, and consequently the aggregate of all, could have readily been computed. Appellant had access to the plat, had it in his own possession, submitted it to his lawyer before the conveyance was made, and a rough or partial computation was made; and he was informed, as he testified, that it was greatly in excess of ten acres,—near fifteen acres in all. Mr. Heisler, counsel for appellant, testified that he informed appellant that the aggregate of the four tracts considerably exceeded ten acres in extent. Appellant went back and informed appellee of the fact. A general discussion followed and explanations; then, with full knowledge, or means of full and accurate knowledge, he concluded to deed, deliberately executed and delivered the conveyance of, the four parcels. It is hardly necessary to say, on these undisputed facts, that a court of equity cannot relieve him.

In *Kerr, Fraud & M.* 236, 237, the law is said to be that “whatever is notice enough to excite the attention of a man of ordinary prudence, and call for further inquiry, is, in equity, notice of all facts to the knowledge of which an inquiry suggested by such notice, and prosecuted with due and reasonable diligence, would have

led. * * * If a man had actual notice of circumstances sufficient to put a man of ordinary prudence on inquiry as to a particular point, the knowledge which he might, by the exercise of reasonable diligence, have obtained, will be imputed to him by a court of equity. The presumption of the existence of knowledge is so strong that it cannot be allowed to be rebutted."

And the text is sustained by numerous authorities cited, both English and American. In *Kennedy v. Green*, 3 Mylne & K. 722, it is said: "Whatever is notice enough to excite attention, and put the party upon his guard, and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it." In Ang. Lim. sec. 187, and notes: "The presumption is that, if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it." In *Wood v. Carpenter*, 101 U. S. 143, after a careful examination of the authorities, it is said: "Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry. There must be reasonable diligence; and the means of knowledge are the same thing, in effect, as knowledge itself."

See 2 Pom. Eq. Jur. § 893; 1 Story, Eq. Jur. § 200; *Tuck v. Downing*, 76 Ill. 71; *Nudd v. Hamblin*, 8 Allen, 130; *Cole v. McGlathry*, 9 Me. 131; *McKown v. Whitmore*, 31 Me. 448; *Enfield v. Colburn*, 63 N. H. 218; *Dickinson v. Lee*, 106 Mass. 557. Having in view these well-settled principles, the court was warranted in finding that the deed was not obtained by fraud and concealment on the part of appellee, nor executed under misapprehension or through mistake of appellant, and that no case was made authorizing a court of equity to decree a

cancellation of the deed, and a reconveyance of a portion of the land. We think the judgment of the district court should be affirmed.

PATTISON and RICHMOND, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

Affirmed.

STATE INS. CO. OF DES MOINES, IOWA, v. TAYLOR.

1. ACTION ON FIRE INSURANCE POLICY—THE INSURED NOT PREJUDICED BY FALSE ANSWERS IN HIS APPLICATION MADE BY AN AGENT OF THE INSURANCE COMPANY WITHOUT HIS KNOWLEDGE.— A fire insurance policy indorsed with a copy of an application purporting to have been signed by the insured, and referring to it as made by him, is not avoided by untrue answers, which he did not give, contained in the application, written by an agent with power to solicit insurance, receive premiums and deliver policies, and by him signed in the name, but without the knowledge or consent, of the insured.
2. PLEADINGS, ISSUES AND TESTIMONY.— Where an answer to a complaint upon a policy of insurance averred that material statements in the plaintiff's application for insurance were not true, a replication thereto averring that the plaintiff did not make or sign the application, but that it was written without his knowledge by the agent of the insurance company, the replication not being attacked by demurrer or motion, makes the responsibility for the application a material issue in the case, and entitles the insured to testify that he did not make or sign it, and to give his version of what actually took place between himself and the agent in reference to the application.
3. THE RULES GOVERNING PRINCIPAL AND AGENT APPLICABLE IN THE CONSTRUCTION OF INSURANCE CONTRACTS.— Contracts of insurance are to be considered and construed by the same rules of law and of interpretation as other contracts, in order to carry out the intention of both parties. Consequently the employment by an insurance company of an agent to solicit, receive and forward to the company applications for insurance, to receive and forward policies, and to collect the premiums, makes him the agent of the

14	499
2a	499
14	499
3a	529
14	499
21	140
6a	110
7a	222
14	499
8a	416
14	499
16a	350
e16a	422

company for the performance of these duties; and any misstatements, errors or omissions resulting from his fraud, neglect or carelessness are chargeable to the insurer, and not to the insured.

4. **DEFENSE TO ACTION ON POLICY, ALLEGING VIOLATIONS OF ITS PROVISIONS BY THE INSURED — FACTS AND CIRCUMSTANCES MAY BE SHOWN IN REBUTTAL.** — The claim that the policy has been avoided by a violation of the provision thereof that the house insured is occupied by the owner as a private residence, whereas it was occupied as an inn or boarding-house, is not available as a defense where it appears that the character of the house in this particular was not changed after the insurance was effected; that the company's agent was informed at the time of making the contract that persons were entertained at the house, more or less, and some boarders kept at times, owing to a want of other places of entertainment, and that this use of the property in no way contributed to the loss.
5. **CONSTRUCTION OF A PROVISION OF THE POLICY AGAINST INCREASING THE HAZARD.** — A provision of the policy, that it shall be void if the hazard is increased without the consent of the company in writing, applies only to the premises of the insured and property under his control. The language cannot be extended to property not under his control, nor to the acts of contiguous owners. So, likewise, the statement made at the time of the application for insurance, that a contiguous building, not owned or controlled by the applicant, was vacant, is to be regarded as a statement of its condition at that time, not as a guaranty that it would remain in that condition.
6. **MEASURE OF DAMAGES — RULE FOR ASCERTAINING THE VALUE OF AN INSURED BUILDING WHICH HAS BEEN DESTROYED BY FIRE.** — In a suit on an insurance policy on a house destroyed by fire, the measure of damages is the value at the time of the loss; and, to arrive at that, the original cost, the cost of a like building at the time of the trial, and the difference in value between the house burned and a new one, by reason of age and use, are all proper subjects of inquiry.

Appeal from District Court of Chaffee County.

On the 30th day of January, 1885, appellant issued to appellee a policy of insurance on his frame house, used as a residence, in the village or town of Hancock, Chaffee county, and its contents, including wearing apparel, family stores and provisions, for the sum of \$1,200,—\$800 being on the building and \$400 on the contents; in-

suring against fire and lightning for one year for a premium of \$48. In the body of the policy appears the following:

"And it is expressly understood and agreed by the parties hereto that application and survey No. 183,956, made by the assured, is hereby made a part of this policy and a warranty on the part of the assured, and that this policy is issued upon the faith of the statements in said application and survey as they thus appear in writing therein, only." Also: "Any false statement in the application shall make this policy void." "In case of loss, any attempt at false swearing or fraud of any kind shall be a forfeiture of all claims against the company on this policy." And: "This company reserves the right to rebuild and repair in all cases of loss."

Of the various provisions contained therein these are thought to be all that are involved in, or necessary to a determination of, the case. Upon the back of the policy is what purports to be an application for insurance made by appellee, with his name attached, in which it is stated, among other things, that the house was "frame;" "one to three years old;" "in good repair;" cash value, \$1,500;" "finished;" "west and north side painted." "It is a two-story frame building, 18x36; one addition 10x22, and one 10x16;" "it is occupied by owner as a private dwelling." "Shingle roof." "Chimneys corrugated or double iron;" "start below ceiling and roof." Number of stoves, "two in use, two others occasionally." "Pipes do not enter brick flues;" "do not pass through partitions or floors." "They are secured by double thimbles of sheet iron." That the "barn was distant from the house about ninety feet." "South eight feet, a one and one-half story log residence, now vacant." "East ninety feet to stable, frame, 16x30."

On the 3d day of November of the same year, the house took fire in the upper part (ceiling or roof) from a stove-pipe, and was destroyed, with most of the contents. On

the next day appellant was notified of the loss; and, shortly after, proper proof was made of the loss, and demand for payment, which was refused, and a suit was instituted. In the complaint the policy of the insurance is set out in full, and on the back of it the supposed application of appellee for insurance.

In the answer the defendant admitted the making and delivering of the policy, denied that the loss was \$1,200 as shown by proofs of loss submitted, and said it ought to be not to exceed \$524.62. The defense relied upon was, the application for insurance made and signed by the plaintiff was the basis of the contract upon which the policy was made, and that it was false or fraudulent in many particulars, notably (1) in the value of the house, stated to be \$1,500 when in fact it did not exceed in value the sum of \$300; (2) that the building was not occupied as a private dwelling, but as a public inn and boarding-house; "(3) that the chimneys in said house were not of corrugated or double iron, and that there were no chimneys in said house, and never was; (4) that the chimneys in said house did not start below the ceilings and roof in said house, and no chimneys whatever were in said house, or were ever used by the plaintiff, at any time; (5) that it was not true that the stovepipes did not pass through partitions, and floors, but they did pass through partitions, floors, ceilings, and roof of the house, and were unprotected; (6) that the stovepipes were not secured at all as stated in the application; (7) that the barn was not ninety feet distant from the house, and not to exceed twenty feet; (8) that the log house was not eight feet distant from the insured premises,—not to exceed five feet,—and at one point connected with the house; (9) that there was an addition to the house, 8x16 feet, not mentioned in the application at all." And as a special defense that the log-house adjoining was at the time of the fire, and for two months previous had been, occupied as a grocery store, and that the proprietors kept in stock

quantities of kerosene oil and giant powder, which greatly added to the risk, and that appellee failed to notify defendant of the fact.

All the averments in the several special answers were traversed by the replication of the plaintiff. The case was, by agreement of parties, tried by the judge of the district court without a jury. He found for the plaintiff in the sum of \$1,045, and judgment was entered for that amount.

STUART BROS., for appellant.

Messrs. W. S. DECKER and C. A. ALLEN, for appellee.

REED, C. It is contended by appellant in argument that the appellee, by setting out in his complaint the application for insurance from the back of the policy, upon which his name appeared, indorsed it as his act and made it a part of the contract sued upon, and was estopped from denying it. The pleader set out the policy of insurance as the basis of his action, and then says: "On the back of the policy is a copy of the application made for the insurance, in writing and print, as follows." It is neither indorsed as correct nor adopted as or stated to be the application of the insured.

The appellant, in its amended answer, states that appellee made his application for a policy of insurance in writing, setting forth the alleged application, and avers that material statements in the application were not true, and for that reason seeks to avoid liability for the loss. The appellee, in his replication, says he did not make or sign any written application, but that the one referred to was made by Van Arsdale, the agent of the company, without his knowledge or consent. There was no demurrer or motion filed to this reply, and the case proceeded to trial upon the issues made by the complaint, answer and replication. By these pleadings the responsibility for the written application was made a material

issue in the case, and the court properly allowed appellee to testify that he did not make any written application, and also to give his version of what actually took place between the parties in reference to the transaction. It is apparent from the evidence that the application for insurance upon which the policy was issued was incorrect in many important particulars; so far from being a true statement of the facts in regard to the insured property as to render a policy void if established by proof to be the act of the insured.

The first question to be determined from the evidence and the law applicable to the facts is whether the *application* was that of the insured, or for which he was responsible, or the application and act of the insurer by its agent, for which it was responsible. That A. D. Van Arsdale was the agent of the appellant to the extent of soliciting insurance, sending the applications for insurance to the company, obtaining policies, delivering them to the insured, and collecting the premiums, was established by his own evidence and that of J. A. Dubbs, the general agent for the state of Colorado. That in this instance he solicited the insurance is shown by the evidence of the appellee, and is undisputed. In regard to the application, there is no great conflict between the testimony of appellee and Van Arsdale. It plainly appears that no application was made out by appellee, or in his presence, nor submitted to him, nor signed by him, and no authority given to the agent to sign his name; that the application was not seen by him, and that he was not informed of its character or contents; that the interview between him and the agent occurred late at night in a saloon, without a blank form of application, and with no copy of the questions to be asked and answered. Van Arsdale says: "I asked questions, and took his answers, and put them down from memory, as nearly as I could, next morning." Appellee specifically denies the making of any of the important statements con-

tained in the application relied upon to defeat a recovery; and, in regard to several of them, he is corroborated by Van Arsdale, and in no important point is he contradicted by him. Van Arsdale, in making up and forwarding the application, cannot be regarded as the agent of the insured, as supposed and contended by counsel for appellant. "Where an insurer intrusts applications in blank for insurance to a person who forwards the same to the insurer, and is the medium through whom the insurer delivers the policy and receives the premium, the person so intrusted therewith is treated as clothed with the requisite authority to effectuate the duties confided to him, and to that extent represents the company, and can bind it. * * * The assured has a right to rely upon it that the agent has authority to explain the inquiries put in the application, and to determine what facts are required to be stated, as well as how they shall be stated, and, acting upon his direction, if any error is committed, it is chargeable to the insurer, and not upon the assured; and, if he fills out the application, and, being correctly informed of the facts, misstates them, or omits to state them, the consequences are not to be visited upon the assured." Wood, Ins. § 384; *Mal-leable Iron Works v. Phoenix Ins. Co.* 25 Conn. 465.

"When a person is in fact the agent of the insurer in procuring a policy, a clause in the policy that persons so acting are agents of the insured, and not of the insurer, does not change the fact. He is still the agent of the company as to the acts which are done in its behalf." May, Ins. § 140.

In *Insurance Co. v. Ives*, 56 Ill. 402, the court, in commenting upon the effect of such a provision in the policy, very pertinently says: "The words have no magic power residing in them capable to transmute the real into the unreal, nor had they power to make the agent of the company an agent of the insured." May, Ins. § 140; *Insurance Co. v. Chipp*, 98 Ill. 96; *Eilenberger v. Insurance Co.* 89 Pa. St. 464.

"If at the time of the application the latter [the insured] states facts material to the risk, and the agent neglects to communicate them to the company, in consequence of which a policy is issued in ignorance of the fact, the neglect is not imputable to the applicant so as to make him responsible as for a concealment. That the agent is instructed to regard himself as the agent of the applicant rather than of the company, these instructions not being known to the applicant, does not alter the case." *May, Ins. supra; Bebee v. Insurance Co.* 25 Conn. 51.

Wilson v. Insurance Co. 4 R. I. 141, was a case where the facts were very similar to those disclosed by the testimony in this case, where the agent sent an application he was not authorized by the applicant to send. He was held to be the agent of the company, so far as to estop it from denying the contract and from setting up its mistakes as misrepresentations as working a forfeiture. It was said: "He was at least the agent of the company for forwarding the application; and his misconduct in that regard was imputable to his principal, and could not be allowed to prejudice the rights of the applicant, who did not know of it." See, further, *May, Ins.* § 141; *Denny v. Insurance Co.* 13 Gray, 492; *Ames v. Insurance Co.* 14 N. Y. 258; *Malleable Iron Works v. Phoenix Insurance Co., supra*; *Woodbury Sav. Bank v. Charter Oak Ins. Co.* 31 Conn. 517.

In *May v. Insurance Co.* 25 Wis. 291, the question of agency presented in this case was ably discussed, and it was said: "The recent cases upon this subject fully sustain the position that upon this state of facts the company is responsible for the accuracy and omissions of its agent, even without any express undertaking to be so, and that it cannot avoid liability by reason of any discrepancy between the real facts as disclosed to him, and his presentation of them in the papers. The tendency of modern decisions has been strongly to hold these companies to that degree of responsibility for the acts of the

local agents which they scatter through the country that justice, and the due protection of the people, demand, without regard to private restrictions upon their authority, or to cunning provisions inserted in policies with a view to elude just responsibility. See, also, *Rowley v. Insurance Co.* 36 N. Y. 550; *Insurance Co. v. Cooper*, 50 Pa. St. 331; *Viele v. Insurance Co.* 26 Iowa, 9; *Insurance Co. v. Schettler*, 38 Ill. 166; *Eames v. Insurance Co.* 94 U. S. 621.

Applying the law to the facts as proved, we must conclude that the employment of Van Arsdale, by the appellant, in the capacity and for the purpose he was shown to have been employed, made him the agent for the company to the extent of receiving, making out and forwarding to the company correct and proper applications for insurance, and that when, as in this instance, he entered upon the duty, and attempted to discharge it, any misstatements, errors or omissions, the results of his own fraud, carelessness or neglect, are to be deemed those of the insurer, and not those of the insured. Contracts of insurance, notwithstanding the intricate and complicated provisions contained in the policies,—perhaps found necessary to protect companies from fraud,—are to be considered and construed by the same rules of law and interpretation as other contracts, so as to carry out the intention of both parties, and hold each party responsible for his own wrong. Where there is on the part of the assured such intentional concealment, misrepresentation or omission as amounts to fraudulent conduct on his part in procuring the insurance, it should vitiate and avoid the contract, and he should suffer the direct results of his own misconduct; but where, on the other hand, there is shown no fraudulent or wrongful representation or omission on the part of the assured, and the wrong is perpetrated through the fraud or negligence of the accredited agent of the insurer, it would be neither just nor equitable to hold the insured responsible for it.

In explaining our views in the present case, we can do far better by adopting and quoting from so eminent a jurist as Folger, J., than by any efforts of our own. In *Rohrbach v. Insurance Co.* 62 N. Y. 63, in a case presenting similar questions to the one under discussion, he said: "It is to be regretted that corporations of the power and extended business relations with all classes in the community which insurance companies have should prepare for illiterate and confiding men contracts so practically deceptive and nugatory, and should, in cases as free from fraud and wrong on the part of the insured as this is, hold their customers to the letter of an agreement so entered into. I am aware that often the companies are made the victims of dishonest and designing persons, but I cannot agree that the remedy for that is to refuse to be bound by the acts of agents of their own selection when dealing with simple and unlettered men. If there should be less greediness for business, and such care taken in the selection and appointment of agents as would insure the confidence of the companies in their capability, discretion and integrity, it would not need that there be laid upon unwise policy-holders an agreement to take the burden of the opposite qualities in those put forward to them as actors for the insurers."

Under the evidence, it must be held that the application which was forwarded was the act of the agent, and consequently the act of the insurer, for which it alone was responsible, and that the company is estopped to set up any statements contained in the application to defeat a recovery. To hold otherwise would be to place every simple or uneducated person seeking insurance at the mercy of the insurer, who could, through its agent, insert in every application, unknown to the applicant, and over his signature, some false statement which would enable it to avoid all liability, while retaining the price paid for supposed insurance. Courts, while careful not

to discriminate against insurance companies, should give to their contracts such interpretation, and to the acts of their agents such construction, as to afford some security to those with whom they contract.

It is contended that the policy was avoided by the assured keeping an inn or boarding-house. It does not appear from the evidence that the character of the house in that particular was changed after the insurance was effected. It appears from the evidence of the appellee that the agent was informed that persons were entertained at the place, more or less, owing to want of other places of entertainment, and that some boarders were kept at times. This is admitted by the agent, Van Arsdale, who says he communicated the fact to the general agent. Both the special and the general agents having been informed that parties were kept, and it not having been shown that such business was more extensively done after than before insurance, or that the loss by fire was in any way caused by people having been entertained, it should not be considered of sufficient importance to reverse the judgment.

It is also urged that the occupancy of the adjoining log-house as a store, carrying in stock kerosene and giant powder, greatly increased the risk, and that the failure of appellee to notify the company worked a forfeiture of the policy. It is not claimed that appellee owned or exercised any control over the building, or that the statement that the building was vacant at the time of the insurance was untrue. The proof shows it to have been occupied only two months before the fire occurred. It is provided in the policy that, if the "hazard is increased without the consent of the company in writing," the policy shall be void. This should be construed as only applying to the insured premises, or to property under the control of the insured. There is nothing in the language used which would extend it to the property not under his control, and the acts of others, and

hold him responsible for the acts of his neighbors or of contiguous owners, and require him to keep informed as to the manner in which other persons in the neighborhood used their property, or to communicate the facts to the insurer. The contract of insurance being mutual, good faith should require that he give information of any fact or act of his own, or with his consent, on property insured or adjoining, and under his control, whereby the risk was increased. Further than that he could not be expected to go. The statement that at the time of the application the building was vacant must be regarded only as a statement of its condition at that time, not a warranty that it should remain so. He, not being the owner, could not be presumed to have intended to take possession and control of the property. May, Ins. §§ 244, 247; Wood, Ins. § 237.

In this case it is shown that the use of the log building owned by a third party in no way contributed to the destruction of the insured property or the loss; that the fire originated in the roof of the insured building, extended to and consumed the log building, but not until the goods, including oil and giant powder, had been removed.

The only remaining question is as to the rule of damages in arriving at the value of the building destroyed. It is contended that the amount allowed was excessive; that the true value was what the property would have sold for in the market. Counsel do not say whether, in fixing the value, the house is to be considered a chattel, and its value what it would bring severed from the realty, or whether its value was to be estimated in connection with the land on which it stood. The rule contended for cannot be the correct one. If so,—if there was no market demand for the property so it could be sold,—it would have no value, and there would be, consequently, no loss. Another trouble is as above suggested: It would make the value of the house insured to depend upon the marketability of the uninsured land.

A farmer might have an insured building of the value of \$5,000 on a large farm, and yet be held to have sustained no loss by its destruction because there was no demand for land in that location, and the farm could not have been sold. While the price for which the property could be sold might be admissible in evidence to assist in arriving at its value, it was not the only, nor a safe, criterion. If not salable at all, it might have a value to the owner as a home for himself and family, or for business purposes. Where, as in this case, the policy was "valued" (amount of insurance fixed), the rule is indemnification to the owner not exceeding the sum insured; the question, not what some one would have paid for the building, but what amount would indemnify the owner for the loss sustained.

The rule of damages is the value of the property lost, and not the cost of replacement. *Steward v. Insurance Co.*, 5 Hun, 261. It is for the jury to determine how much money will make good to the insured his loss. *Brinley v. Insurance Co.* 11 Metc. 195. "It is for the jury to say what the actual value of the building was, in view of all the facts, and their finding is conclusive." Wood, Ins. § 446.

Counsel seem to have confounded the measure or rule of damage for merchandise or goods destroyed with that for buildings. In the former the value in market is correct. In the latter it must be "*the actual value of the property in the condition it was in at the time of loss, taking into consideration its age and condition, and not necessarily what it would cost to erect a new building.*" The assured should be allowed *the value of his building at the time of loss; and if, by reason of age or use, it is less valuable than a new building erected upon the same plan, of similar materials and of the same dimensions, the insured should be allowed for such difference arising from deterioration.*" Wood, Ins. § 446; *Insurance Co. v. Sennett*, 37 Pa. St. 205.

It follows that the original cost of the building, the cost of constructing a like building at the time of trial, on the same land, and the difference in value between the building destroyed, by reason of its age and use, and a new one, were all proper inquiries to assist the court in arriving at a just conclusion in regard to the loss sustained; and the admission of evidence upon these points was not erroneous, as supposed by appellant. In our view of the case, no serious errors occurred upon the trial, and the judgment should be affirmed.

RICHMOND and PATTISON, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

Affirmed.

GILPIN V. ADAMS.

1. THE STATUTE OF LIMITATIONS IS PLEADABLE TO ANY ONE OR ALL OF SEVERAL DISTINCT CAUSES OF ACTION, THOUGH EMBRACED IN A SINGLE COUNT.— When a complaint states several distinct causes of action — as for moneys expended for the use of defendant; for services performed by plaintiff as agent of the defendant; for the use of property by the defendant, etc., — the statute of limitations may be pleaded to each or all of these several items, although all are joined in one count. It is therefore not a valid objection to a judgment in such case that the court, after the commencement of the trial, permitted the plaintiff to dismiss without prejudice his action as to all but two of the items declared upon, thus preventing the defendant from pleading the statute of limitations to the latter items, as he would have done had they been originally declared upon in this form. Such an objection could not be available in any case unless accompanied by a seasonable offer by the defendant to so amend his answer as to set up the statute as a defense.
2. LANDLORD AND TENANT — A VALID LEASE, IN THE ABSENCE OF SOME DEFAULT BY TENANT, NO DEFENSE TO A SUIT BY LANDLORD AGAINST HIS LANDLORD UPON A DIFFERENT CAUSE OF ACTION.— It is not a valid defense to an action for services, and for moneys expended for use of the defendant, that plaintiff held a lease of a tract of

land from defendant, on which he grazed a large number of animals without paying anything for the privilege, when the lease itself shows that it was given in consideration that the lessee would construct and maintain fences and irrigating ditches, plant trees, erect certain buildings, pay taxes and generally keep the premises in good repair. The lease shows ample consideration for the use of the land, and, in the absence of some default on part of the lessee, is no defense to an action upon a wholly different agreement.

Appeal from District Court of Rio Grande County.

Messrs. MARKHAM & DILLON and W. M. MAGUIRE, for appellant.

Mr. JOHN L. JEROME, for appellee.

RICHMOND, C. In this action, plaintiff below, appellee here, sought to recover for moneys paid out and expended by plaintiff for the use of defendant, and for services performed by plaintiff as agent in and about the management of certain property known as the "Baca Grant," and for services in and about the mining property of the defendant on said grant, and the leasing of the same, and for the use of horses furnished by the plaintiff for the use of defendant, at his request, and for interest upon divers sums of money advanced by the plaintiff for the use of the defendant, at his request.

The form of the complaint is in the nature of a declaration upon consolidated common counts. After the impaneling of the jury, plaintiff made application to be allowed to dismiss without prejudice all the items of account described in the complaint, except the items for money paid out and expended, and for services as agent from November 1, 1878, to August 1, 1883. This application was granted, and thereafter the cause was tried to a jury, and verdict rendered in favor of plaintiff for the sum of \$8,055.55. Six thousand seven hundred and fifty dollars was allowed plaintiff for services, and \$1,305.55 for moneys advanced and expended. Motion for a new trial was interposed, whereupon the court in-

timated that, unless the plaintiff remitted the sum of \$1,305.55, a new trial would be granted. The intimation of the court was acted upon. Thereafter judgment was rendered upon the verdict for the sum of \$6,750.

Fourteen errors are assigned, eight of which are to the admission of evidence over the objections of defendant. The others are addressed to alleged errors in overruling appellant's motion for a nonsuit and motion for a new trial, and permitting the appellee to remit so much of the amount embraced in the verdict as related to moneys expended, and that the verdict was contrary to the evidence. But one error specifically assigned is discussed in the brief of appellant. Counsel for appellant confine their discussion to two points: *First*, that the verdict was clearly contrary to the evidence; therefore a new trial should have been granted. *Second*, that after the commencement of the trial the court permitted the appellee to dismiss without prejudice as to all the items declared upon except two.

We will discuss the second point first, although we are not prepared to admit that this point is entitled to consideration in this court. No exceptions were taken at the time the court permitted the plaintiff to dismiss the action upon the various items referred to, nor is it specifically assigned for error. It is claimed, however, that it was embraced in the application for a new trial, and that, inasmuch as exceptions were reserved to the action of the court in overruling the motion for a new trial, it is a legitimate subject for discussion on appeal. While not conceding this claim of appellant, we will, however, determine the question.

Appellant contends that striking out the various items from the complaint changed the character of the action, and prevented the defendant from pleading as he would have pleaded if the action had been brought originally on the two items only,— that of service performed, and money expended; that, as the suit was originally brought,

it was on a book-account, and consisted of more than thirty items, running through a series of years from 1878 to 1886; and that, the last item of the account being within the statute of limitations, the defendant was not at liberty to plead the statute, whereas, if the action had been brought for salary for services only, the defendant could have so pleaded.

The complaint does not set out a claim upon a book-account, nor does the record contain the itemized statement referred to in the appellant's argument; and it nowhere appears in the record that at the time of the application, and granting of the same, appellant then and there made application to amend his answer by interposing the plea of the statute of limitations. If, as he says, the plea could have been and would have been interposed, had the action been confined to a claim for services, we see no reason why, to this particular item, he might not, upon application, have so amended his answer as to interpose the statute; nor can we agree with the position taken by appellant, that he could not in the first instance, by answer, have raised the question of limitation to the claim for services. Several causes of action were joined in one count. To this form of complaint no objections were made, and each particular item was as definitely set forth as though the complaint had contained as many particular causes of action as there were items; and the statute of limitations could have been pleaded to each or all of the items so distinctly enumerated in the complaint. *Schillo v. McEwen*, 90 Ill. 77.

When several counts are thus used, the defendant may, according to the nature of his defense, demur to the whole, or plead a single plea applying to the whole, or may demur to one count and plead to another, or plead a separate plea to each count; and in the two latter cases the result may be a corresponding severance in the subsequent pleadings, and the production of several issues.

But, whether one or more issues be produced, if the decision, whether in law or in fact, be in the plaintiff's favor as to any one or more counts, he is entitled to judgment *pro tanto*, though he fail as to the remainder. Steph. Pl. 257, 258.

Several causes of action may be joined in one count, and it will not be necessary to prove all the causes alleged. Recovery may be had *pro tanto*. Puter. Pl. & Pr. 69. We deem it too late for the plaintiff now to insist on the right to interpose the statute of limitations. Upon proper showing the court would and could, under the code, have permitted, in the furtherance of justice, an amendment to his answer; and inasmuch as it was in his power to plead the statute, in the first instance, to the particular item for which recovery was had, we do not think that he should now be permitted to complain.

As to the first point, the main contention of appellant is that Adams had a lease of this grant, or a portion of it, upon which he grazed a large amount of stock, and for which privilege he paid no compensation. The lease which was executed between the parties does not support the argument. By the terms of that lease it appears that a certain portion of the Baca grant was leased to plaintiff, and that, in consideration of the lease of the premises, plaintiff agreed to construct and maintain a good and substantial fence, with double posts of cedar or pitch pine, not less than seven and one-half feet long, around the entire tract of ground, which was to be completed within a year from the 1st of November, 1878; that he would pay all taxes then due, and all taxes thereafter levied upon the premises during the lease; that he would construct with all due diligence an irrigating ditch upon the premises, sufficient and capable of irrigating all of the bottom lands practically capable of irrigation; that he would plant one or more rows of cotton-wood or other shade trees along the north line of the fence to be constructed, and that he would construct lateral ditches

for the purpose of irrigating lands lying along the various creeks on the said grant; that he would build and maintain in good repair upon the premises an adobe brick dwelling of not less than four rooms, and such barns, granaries, *corrals* and other outhouses and inclosures as may be needed from time to time during the continuance of the lease; and further, that he should construct bridges where they were necessary over the creeks and streams of water for irrigating ditches, where the roads crossed them, and should keep all the improvements so constructed by him in good order and repair during the continuance of the lease, and at the expiration thereof yield the possession of the same to the party of the first part in like good order and condition, and the said improvements were then to be and become the property of the party of the said first part.

It was further provided by the lease that all the timber and mining lands comprised within the grant were reserved from the operation of the lease to the uninterrupted use and disposal of the party of the first part, and provided, further, that the party of the second part should have the care and custody of the mining and timber lands, and keep trespassers therefrom, and should be permitted to use so much timber as he desires for fencing and building purposes and repairs, for fuel, and such other purposes necessary for the maintenance and improvement of the premises.

This, it seems to us, was ample consideration for the privilege of occupying the land, and grazing stock thereon. But, in addition to the plaintiff becoming the tenant of defendant, he was employed by the defendant in and about the mining premises situated on the grant, in securing a recognition of the defendant's title by a large number of persons occupying certain portions of the tract, and in securing such persons, engaged in mining thereon, to take from the defendant a lease of the premises. Indeed, the evidence discloses the fact to be

that plaintiff had general control of the entire tract of land. No complaint, it seems, was ever made to his conduct or acts as agent; and all of such acts as such agent were recognized by the defendant. The testimony establishes the employment of appellee by appellant, and an agreement to pay him reasonable compensation for such services. At least, from all the testimony, such was the conclusion of the jury; and, no definite sum having been agreed upon, they were justified in determining, under the complaint and proof, what such services were reasonably worth. *Mattocks v. Lyman*, 16 Vt. 113; Wood, Mast. & Serv. § 100.

To our mind, there was sufficient evidence to warrant the jury in finding for the plaintiff, and, from all the evidence, we are not prepared to say that the amount of the verdict as compensation was in excess of the actual services rendered. The judgment should be affirmed.

PATTISON and REED, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

Affirmed.

HAYT, J., not sitting.

BERNHEIMER V. CITY OF LEADVILLE.

1. POWER OF MUNICIPAL CORPORATIONS TO LICENSE.— The authority of municipal corporations to grant licenses for occupations carried on within their limits exists by force of the statute alone, and they cannot legally exact license fees from those engaged in business pursuits not included or covered by the statute.
2. AN INSURANCE AGENT IS NOT AN INSURANCE BROKER.— An insurance agent employed by one company to represent it in soliciting applications for insurance, with authority to write and issue policies, is not an insurance broker, nor subject to a city ordinance requiring insurance brokers to pay a license fee.

14	518
9a	492
9a	493

14	518
34	397

Error to County Court of Lake County.

Messrs. S. D. WALLING and J. R. MOSBY, for plaintiff in error.

Messrs. J. D. FLEMING and CHAS. H. WENZELL, for defendant in error.

PATTISON, C. It appears from the record in this case that on September 2, 1885, plaintiff in error was arrested for the violation of section 10, chapter 11, of an ordinance of the city of Leadville. The offense charged was that plaintiff in error "did engage in, pursue and carry on the business and occupation of an insurance broker, without first having obtained a license from the city of Leadville, as required by the ordinances," etc. He was duly tried by the police magistrate, adjudged to be guilty, and fined \$13 and costs. Subsequently, upon appeal to the county court of Lake county, a new trial was had, and he was again convicted, and a fine of \$5 and costs was imposed. A review of this judgment is sought in this court.

The proceeding was had under section 10 of an ordinance entitled "An ordinance for compiling the general ordinances of the city of Leadville," adopted January 2, 1885. By this section the amount of the license fees is fixed which are required to be paid to the clerk of that city, for the privilege of exercising certain trades and avocations. The part of the section presented for consideration reads as follows: "The several amounts to be paid to the said clerk for licenses imposed by the said council upon the applicant shall, in addition to the fee for issuing the same of fifty cents, to be paid to the city clerk, be as follows [among others]: Insurance brokers, \$50 per annum." To enforce the ordinance it was provided that, upon conviction for a violation of its provisions, a fine of not less than \$5 nor more than \$200 should be imposed, etc. Was plaintiff in error subject to this provision?

The city of Leadville was organized under the statute relating to towns and cities which was in force in 1877. The office performed by the provisions of that and similar statutes is clearly and well defined. These statutes confer upon communities within this state authority to exercise the powers of municipal corporations upon compliance with their provisions. When the necessary steps have been taken to secure the privileges and franchises offered by the law, and proper proof has been made of compliance therewith, then such community becomes a municipal corporation, and is authorized to exercise all the powers, rights, franchises and privileges particularly mentioned in the act under which the organization was perfected.

It is a well-settled elementary principle that the charter of a municipal corporation, or, if organized under a general law, that such general law, is the instrumentality by means of which the legislature of the state delegates to the municipal body the right to exercise such franchises, and such legislative power and authority, as may be essential to the safety, well-being and prosperity of the community. It is equally well settled that the charter or the law by which the municipal body is created is to be strictly construed, and that no powers are to be exercised except those which are expressly conferred, or which exist by necessary implication. This principle of law is expressed with extraordinary clearness in 1 Dill. Mun. Corp. § 89: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: *First*, those granted in express words; *second*, those necessarily or fairly implied in, or incident to, the powers expressly granted; *third*, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the

power is denied. Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized thereby. All acts beyond the scope of the powers granted are void." Of the power to license, it is needless to say that it exists perforce of the statute alone.

To determine whether plaintiff in error could be required to pay a license fee, a review not only of the statute of 1877, but other legislation had in relation to the authority of cities and towns to license, regulate and control business of the nature of that carried on by him, may be instructive. Subdivision 21, section 1, article 3, chapter 84, of the territorial laws relating to towns and cities, expressly conferred upon the board of trustees of such towns and cities the right to "license, tax and regulate commission merchants, innkeepers, brokers, money brokers, insurance agents, auctioneers, hawkers," etc. This chapter of the territorial laws was expressly repealed in 1877 (Gen. Laws 1877, § 2745).

Sections 2654 and 2655 of the General Laws of 1877 define the powers of towns and cities organized under the new act. Authority to license, etc., is expressly conferred by subdivisions 13-16, 28 and 61 of section 2655. It is unnecessary to recite any of these subdivisions except the sixty-first. It reads as follows: "To tax, license and regulate auctioneers, distillers, brewers, lumber yards, livery stables, public scales, money changers, and brokers: provided that the exercise of their powers shall not interfere with the sales made by sheriffs, constables, tax collectors, * * * or any other person required by law to sell real or personal property at auction." It will be observed that by this provision no authority is expressly conferred to license an "insurance agent." By the territorial law express authority was granted to license such agents. The provisions of the

General Laws of 1883 in respect to the power to license are the same as those of 1877, and need not be recited. The use by the territorial legislature of the phrase "insurance agents," and also the word "brokers," indicates that in the judgment of that body the two were not synonymous in meaning, and that the word "broker" did not include insurance agents. The subsequent action of that body in striking out the phrase "insurance agents" shows an intent to withdraw the authority previously conferred as to this class of persons.

But, discarding for the present the foregoing consideration, we are of the opinion that under the authority to license brokers a license fee could not be exacted from plaintiff in error. As has already been shown, defendant in error was without express authority to license an "insurance agent." It necessarily follows that if plaintiff in error was an insurance agent within the meaning of the law, and such agency be not covered by the term "broker," he was not subject to the provisions of the ordinance, and that the proceeding against him was unauthorized.

By the agreed statement of facts submitted to the court below the question of plaintiff in error's capacity is relieved of all doubt and difficulty. It appears that "said Bernheimer was duly authorized and commissioned by the commission of said company [the Travelers' Life and Accident Insurance Company], issued to him under the hands of the proper officers and the seal of said company, within certain territory, in said commission described, including the territory within the corporate limits of the said city of Leadville, in said county and state, to solicit and receive, as agent of said company, applications for insurance and policies of insurance to be issued by and in the name of said company, and as such agent to write and issue for and by the authority of, and in the name of, said company, policies of insurance, insuring and in-

demnifying all persons procuring the same, and named in such policies of insurance, against death and accident," etc. Other facts need not be recited. Such an insurance agent is certainly not an insurance broker. In 1 Bouv. Law Dict., brokers are defined to be "those who are engaged for others in the negotiation of contracts relative to property with the custody of which they have no concern." The same author states that "insurance brokers procure insurance, and negotiate between insurers and insured."

In Anderson's Dictionary of Law an "insurance broker" is defined as "a person who negotiates contracts of insurance. He is agent for both parties. An insurance agent is ordinarily an employee of the insurer only." An insurance agent clothed with the authority of plaintiff in error, as shown by the statement of facts, is not regarded as the agent of the insured.

It is unnecessary for the purposes of this case to define the office of an insurance broker. It is sufficient to say that he usually acts for both parties; he represents no particular company; he is employed for a specific purpose. It is his business to act upon particular occasions. Plaintiff in error was the acknowledged agent and representative of a particular company. He was acting under a commission issued to him under the hand and seal of the Travelers' Life and Accident Insurance Company. He was the representative of that company within a particular district. He was authorized not only to take applications for insurance, but in the name of the company to make contracts of insurance and issue policies. The company was bound by his acts. It can hardly be said that, in the conduct of this business, plaintiff in error was the agent of such citizens as might apply to him for insurance. He was not an insurance broker, within the purview of the statute.

Further discussion is unnecessary. The ordinance in

question was not applicable to him. The proceeding was therefore unwarranted. The judgment of the court below should be reversed.

REED and RICHMOND, CC., dissenting.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is reversed.

Reversed.

14 524
1a 467

CASTAGNO V. CARPENTER, ADMINISTRATOR.

1. INSTRUCTIONS TO JURY — APPELLANT CANNOT COMPLAIN OF ERROR WHICH DOES NOT PREJUDICE.— Where the appellant assigned error upon an instruction given at the trial, and it appears that the portion of the instruction applicable to the facts of the case stated the law correctly, and that the portion complained of could not have been prejudicial to the appellant in any event, it affords no ground for reversal.
2. ACTION AGAINST INDORSER OF PROMISSORY NOTE, THE MAKERS NOT HAVING BEEN PROSECUTED TO INSOLVENCY.— In a suit against the indorser of a promissory note, no action having been instituted against the makers, the question whether a suit against the latter would have been wholly unavailing was properly submitted for the determination of the jury on the evidence, under section 7, chapter 9, General Statutes.

Appeal from District Court of Ouray County.

Messrs. J. P. CASSIDY and J. W. MILLS, for appellant.

Mr. S. L. CARPENTER, for appellee.

PATTISON, C. This action was brought by Luther Harris in his life-time against John Castagno, appellant, as assignor of a certain promissory note bearing date June 1, 1882, made by Nellie G. Bragaw and R. S. Bragaw, her husband, for the sum of \$275, payable to the order of George P. Costigan one year after date, with interest at the rate of two per cent. per month.

The original complaint was in the usual form, and alleged, among other things, that the note was assigned or indorsed to appellant on or about June 15, 1882, and that it was thereafter indorsed by him to one W. M. Stewart, and by Stewart to Harris.

To this complaint a demurrer was interposed. Subsequently, by amendment, the following allegation was added: "That at the time said note became due the makers thereof, and each of them, were insolvent, and each of them ever since have been and now are insolvent."

An answer was filed which put in issue the material allegations of the complaint, and set up certain affirmative defenses, which need not be considered by this court.

The only question presented to this court (that being the sole issue tried by the court below) arises upon the allegation of the complaint to the effect that at the time the note in question matured the makers of the note were wholly insolvent. As no action has ever been instituted against the makers, the purpose of this allegation, and the proof introduced to sustain it, was to show that such an action would have been entirely unavailing within the meaning of the statute.

The nature and extent of the liability of the assignor of a negotiable instrument is expressly defined by section 7, chapter 9, General Statutes. That section provides that "every assignor * * * of every such note * * * shall be liable to the action of the assignee thereof, or his executors or administrators, if such assignee shall have used due diligence, by the institution and prosecution of a suit against the maker of such assigned note, * * * for the recovery of the money or property due thereon, or damages in lieu thereof; *provided* that, if the institution of such suit would have been unavailing, * * * such assignee * * * may recover against the assignor * * * as if due diligence by suit had been used."

It is conceded that if, at the maturity of the note in question, the makers thereof were insolvent, then a suit against them would have been unavailing within the meaning of the statute, and that to fix the liability of the assignor an action against them was unnecessary.

The execution and the assignment of the note being admitted, the only issue presented to the court below was that of the insolvency of the makers, and all the evidence introduced at the trial bore directly upon this issue. A review of the evidence in behalf of plaintiff is entirely unnecessary. It is sufficient to say that such evidence tended to show that the makers of the note were insolvent, not only in the county of Ouray, where they resided at the time the note was made and at its maturity, but that they were without property anywhere within the state of Colorado or elsewhere. No evidence on the part of the defendant was offered which showed, or tended to show, that the makers, or either of them, were solvent, or that they had property anywhere within the state which was subject to execution, except that hereinafter recited.

Mr. Cassidy, attorney for the appellant, was sworn as a witness, and stated in substance that he had examined the records of the county of Ouray, and found that on the 4th day of June, 1883, Mr. Bragaw was the owner of an undivided one-quarter interest in a lot 50x142 in the town of Ouray, and three mining claims; that this tract of land and these mining claims were incumbered with a \$300 trust-deed, upon which a balance of \$25, with interest thereon for about two years, remained unpaid; that the value of the lot was \$150. There is no evidence whatever as to the value of the three mining claims. The records were not produced, and Mr. Cassidy did not state whether this property was actually owned by Mr. Bragaw when the note matured. It further appears that the property mentioned had been sold for taxes in June,

1883. No other evidence was introduced on behalf of the defendant.

The jury were instructed to the effect that, if they found that the makers of the note were insolvent in the county in which they lived at the time of making the note, and had lived for several months before, that it was not necessary to show their insolvency throughout the country; that, when a fact or state of facts is found to exist approximately, the law presumes such fact or state of facts to continue till the contrary is shown; that if the jury should find by the preponderance of proof that the makers of the note were insolvent or had absconded when the note became due, or that the institution of the suit against the makers of the note would have been unavailing, then the verdict should be for the plaintiff. The other instructions given by the court need not be recited.

The argument of appellant is predicated upon this instruction, and upon the further proposition that the testimony of Cassidy shows that R. S. Bragaw had property subject to execution which might have been reached and applied in part payment of the note had suit been begun against the makers in the first instance.

It is first insisted that the court erred in instructing the jury that, if they should find the makers of the note insolvent in the county in which they lived, plaintiff need not show their insolvency throughout the country. It is unnecessary to determine whether this part of the charge was erroneous or not. The evidence introduced by plaintiff tended to show that the makers of the note were without property anywhere in the state of Colorado, and there was no testimony introduced by defendant which showed, or tended to show, that they had property anywhere, except that of Cassidy, which related solely to the property situated in the town and county of Ouray. As there was no testimony to which the instruction could apply, it is manifest that defendant was

not prejudiced, and the error, if it was one, was harmless.

It is further contended that the proposition embraced in that part of the instruction in which the court said that, when a fact or state of facts is found to exist approximately, the law presumes such fact or state of facts to continue until the contrary is shown, is erroneous. It may be assumed that this portion of the instruction was suggested to the court by the fact that the evidence of some of the witnesses as to the financial condition of the makers of the note was not confined to the precise point of time at which the note matured. But as the testimony, taken as a whole, clearly showed that these parties were insolvent when the note matured, and from that time until the trial was had, it is clear that the defendant could not have been prejudiced. The remainder of the instruction states the law clearly and correctly, and no complaint is made by appellant concerning it.

Again, it is contended that the testimony of Cassidy was sufficient in itself to show that an action against the makers of the notes would not have been unavailing, within the meaning of the statute. This position is untenable. The evidence of Cassidy was not contradicted. Two or three of plaintiff's witnesses stated that they had claims against these parties; that they sought for property out of which to make their claims, but could find none; that the little property which they had was so incumbered that no equity of any appreciable value remained to them; that in their opinion they were wholly insolvent. The question of insolvency, therefore, was one for the jury and not for the court. That question was correctly submitted to the jury by the following instruction: "The court instructs the jury that an indorser on a note is not liable for the payment of said note in default of payment by the makers, unless the holders first procure judgment against the makers thereof, and have return of execution that said judg-

ment cannot be satisfied out of the property of the makers of said note, or prove to the satisfaction of the jury that, if suit had been brought on the note against the makers thereof, and judgment recovered thereon, the said judgment could not have been satisfied, either in whole or in part, out of the property of the makers of said note."

That this is a correct statement of the law cannot be doubted. In *Dunn v. Ghost*, 5 Colo. 134, it is held that "the statute fixes the liability of an assignor by indorsement of negotiable instruments after diligence against the maker by suit, unless such suit would have been unavailing." The same principle is enunciated in *Martin v. Cole*, 104 U. S. 30. In *Wickersham v. Altom*, 77 Ill. 620, it is said that, "where the evidence shows that the maker of an indorsed promissory note was insolvent at its maturity, and so continued, and therefore a suit against him would have been unavailing, the assignor will be liable to the assignee upon his assignment." As the provision of our statute under consideration was borrowed from Illinois, the decisions of the supreme court of that state are good authority here.

The record fails to disclose any error of which appellant can justly complain. It is unnecessary to consider in this connection the effect of section 13 of the Code of Civil Procedure, permitting the joinder in the same action of parties and sureties to promissory notes. See *Hamill v. Ward*, ante, p. 277. The judgment should be affirmed.

REED and RICHMOND, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

Affirmed.

WILSON ET AL. V. HAWTHORNE.

14	530
16	459
14	530
17	61
17	74
14	530
19	83
14	530
12a	191
12a	229
12a	241
14	530
14a	459
d14a	460
14	530
16a	368
16a	370
14	530
e32	480
17a	464
17a	466
e17a	468
17a	469
14	530
f37	571
38	463

1. PLEADING—LEGAL EFFECT OF UNCONTROVERTED ALLEGATIONS.—Every material allegation of a complaint or answer, not controverted, must, for the purposes of the action, be taken as true.
2. JURISDICTION—HOW A JUDGMENT MAY BE IMPEACHED.—A judgment rendered without obtaining jurisdiction of the person may be impeached by a proceeding in equity, or by answer to an action, where equitable defenses are allowable.
3. SAME—ALLEGATION OF MERITS.—An allegation of merits should be made in a complaint or answer denying the validity of a judgment as an earnest of good faith; but such allegation is not essential or traversable.
4. UNDER CODE PRACTICE A JOINT EQUITABLE DEFENSE MAY BE SUFFICIENT AS TO A SINGLE DEFENDANT THOUGH INSUFFICIENT AS TO OTHERS.—The rigid rule in common-law actions that a joint plea insufficient as to one defendant is insufficient as to all is not applicable to an equitable defense, under the Colorado Code of Procedure. *Quere*, whether a judgment rendered against several parties may be maintained against those over whom jurisdiction was regularly obtained, when set aside as to others for want of jurisdiction.

Appeal from District Court of Clear Creek County.

Mr. W. T. HUGHES, for appellants.

MR. JUSTICE ELLIOTT delivered the opinion of the court

From the abstract of record in this case it appears that the action was begun by appellee as plaintiff in the county court in 1885 to recover the balance due upon a certain other judgment rendered in his favor in the same court in 1878. To the complaint appellants, as defendants, filed an answer containing certain denials, and also a further equitable defense or cross-complaint verified.

The cross-complaint is in the nature of a bill in equity to impeach a judgment for want of jurisdiction. Its allegations are affirmative both in form and substance. They are to the effect that the judgment sued upon was rendered by the county court of Clear Creek county upon

an appeal from a justice's court; that no summons was served upon Henry Wilson from the justice's court; that he did not appear in that court, did not unite in the appeal to the county court, and never appeared in the action, either in person or by attorney, and further, that the entry of the appearance of Henry Wilson by the county court was unauthorized; that Henry Wilson was not served with process, and did not appear in person in the case at any time; that the attorney for David R. Wilson was without authority to appear for Henry, and in fact appeared for David R. alone, so that the judgment of the county court was void for want of jurisdiction; and that the county court, though duly requested in apt time by motion supported by affidavits to amend the record so as to show that said Henry Wilson was not subject to its jurisdiction, refused so to do. Upon these and other pertinent and amendatory allegations added by leave of the court excusing delay in not sooner seeking relief from the judgments sued upon, defendants demanded "that the said judgment be vacated and annulled, and that the plaintiff be enjoined from further proceedings thereon."

From the abstract of the record before us it further appears that a demurrer upon general grounds, and also upon the ground that the matters set forth in the cross-complaint were barred by the statute of limitations, was interposed, and sustained by the county court; that thereupon an appeal was taken to the district court of Clear Creek county, in which court the demurrer to the cross-complaint was overruled, and leave and ample time were given to plaintiff to answer the same. After these recitals the abstract of record contains the following statement: "December 23, 1886, no answer to the cross-complaint having been filed, the cause came on for trial upon the allegations of the cross-complaint and its amendments. After hearing the evidence, consisting of record exemplifications, the court adjudged the cross-

complaint and its amendments insufficient, and dismissed the same."

The defendants bring this appeal. No part of the evidence or of the record exemplifications appear in the abstract of record. The only error assigned is that "the court erred in dismissing the cross-complaint and refusing the relief prayed for."

This appeal is governed by the act of 1885 (Sess. Laws, 350). Section 16 of said act provides that "the cause shall be submitted to the supreme court upon the printed abstract of record and amended abstracts, as hereinafter provided, and no transcript of record in writing shall be filed, and no costs shall be taxed therefor except as herein provided." In construing this section of the statute, this court, in the case of *South Boulder Ditch & Reservoir Co. v. Community Ditch & Reservoir Co.* 8 Colo. 429, said: "The review of the case is had upon the printed abstracts." The same rule was announced in *Halsey v. Darling*, 13 Colo. 1.

By overruling the demurrer, the district court adjudged the equitable defense or cross-complaint sufficient in law to bar the plaintiff of his action, at least as to one of the defendants. The plaintiff having failed to answer or reply to the cross-complaint, every material allegation thereof must, "for the purposes of this action, be taken as true." This rule of pleading is expressly declared by the Code of Civil Procedure of this state, and is sustained by the general current of authority. Colo. Code, § 71; Pom. Rem. § 617; *Crater v. McCormick*, 4 Colo. 196; *Tucker v. Parks*, 7 Colo. 62; *Silvey v. Neary*, 59 Cal. 97; *Fergus v. Tinkham*, 38 Ill. 407.

It follows from the foregoing that, unless there was fatal error in overruling the demurrer to the cross-complaint,—that is, unless said cross-complaint is wholly insufficient, both in form and substance, for any purpose whatever,—the action of the court in dismissing the same for insufficiency as to both defendants cannot be sus-

tained. It becomes necessary, therefore, to consider whether the equitable defense or cross-complaint as pleaded is fatally defective, or whether it is sufficient in substance as an answer to the plaintiff's action upon the original judgment, either in whole or in part. Though the authorities are somewhat conflicting upon questions of this kind, we think that the better doctrine is that a judgment rendered without obtaining jurisdiction of the person may be impeached and set aside by a proceeding in equity for that purpose; that in such proceeding the recitals of the record will not be taken to import absolute verity; and also that an action brought upon a judgment pronounced without obtaining jurisdiction of the person of the defendant may be defeated by a proper answer, under a system of procedure allowing equitable defenses to be interposed in all civil actions. To warrant such relief, the contradiction of the record must be clearly established; but we need not discuss the kind or quantum of evidence required, since, in this case, no issue was taken on the cross-complaint. Code Colo. §§ 59, 60; Bliss, Code Pl. § 347; Freem. Judgm. § 495; *Marr v. Wetzel*, 3 Colo. 2; *Great West Min. Co. v. Woodmas of Alston Min. Co.* 12 Colo. 46; *Thompson v. Whitman*, 18 Wall. 457; *Ridgeway v. Bank*, 11 Humph. 523.

In determining whether or not the cross-complaint as pleaded is sufficient, it becomes necessary, also, to consider whether a judgment rendered without due process of law, and without jurisdiction over the person, may be relieved against without any showing of merits by the party seeking such relief. Here, again, the authorities are in conflict. The cross-complaint in this action contains no allegation that the defendant Henry Wilson was not liable in the original action equally with the defendant David R. Had the demurrer been specially interposed and sustained for the want of such averment, the ruling would not have been erroneous. The jurisdiction

of equity should not be invoked except by a complaint alleging that real injustice has been or is likely to be done. But we are not prepared to say that such averment is essential or traversable. The showing of merits should not be required to the extent of compelling a party against whom a judgment has been obtained, without jurisdiction over his person, to come into a court of equity and assume the burden of disproving his liability. On the contrary, a party thus circumstanced is entitled to the maintenance of his right to defend against such supposed liability in an action wherein his adversary must assume the burden of proof. This distinction is important in all cases, and in many may be absolutely controlling.

The allegation of merits, though not traversable, may very properly be required as an earnest of good faith from the party seeking relief from a supposed unauthorized judgment; and as a rule, under our system, such pleading may be required to be verified. If a pleading be demurred to for want of such averment, it may be dismissed, unless amended; but in this case the absence of the averment, not having been made a ground of demurrer, did not justify the dismissal of the cross-complaint. *Freem. Judgm.* § 498; *Bell v. Williams*, 1 Head, 229; *Ryan v. Boyd*, 33 Ark. 778; *Crawford v. White*, 17 Iowa, 560.

In view of a retrial of this action, it is desirable that it should be now determined whether or not the equitable defense or cross-complaint can be made available in favor of the defendant David R. Wilson, as well as the defendant Henry. The authorities are divided upon questions of this character. It has been frequently asserted that a judgment is an entirety, and if void against one defendant is void against all. On the other hand, it has been held that a judgment rendered against several parties, part of whom were not subject to the jurisdiction of the court, may nevertheless be maintained against those over whom jurisdiction was regularly obtained. But in cases

of the latter class the validity of the judgment seems to depend upon the circumstances of the particular case, such as the form of the judgment, the consideration upon which it was founded, the relation of the parties defendant to each other, statutory provisions, the mode in which relief is sought, and the like. See case of *St. John v. Holmes*, 32 Am. Dec. 603, together with note and cases appended thereto. From the abstract of the record before us it does not appear that the original judgment was in any manner challenged upon this particular ground; and the abstract is not sufficiently specific to enable us to determine the question with safety, so we shall not express an opinion upon the matter. But in this connection it is proper to observe that if it should be determined on a retrial that the matters contained in the equitable defense are sufficient as to Henry Wilson, but not as to David R., the fact that Henry pleaded the defense jointly with David, instead of pleading separately, will not defeat Henry's right to protection against the original judgment. The rigid rule in common-law actions announced in *Deitsch v. Wiggins*, 1 Colo. 299, that a joint plea, insufficient as to one defendant, is insufficient as to all, is not properly applicable to an answer in chancery, or to an equitable defense of this kind, under the liberal provisions of our Code of Procedure, especially after a demurrer, not interposed upon such ground, has been overruled, and the privilege of amendment passed by. Code Colo. §§ 59, 70, 77, 443; Story, Eq. Pl. §§ 443, 692; *Huggins v. Building Co.* 2 Atk. 44.

The plaintiff not having made answer or reply to the cross-complaint, his action should have been dismissed, at least as to the defendant Henry Wilson, unless said defendant desired to have the case heard for the purpose of obtaining the affirmative relief sought by the cross-complaint. The judgment of the district court is reversed and the cause remanded.

Reversed.

SEAMAN, IMPLEADED, ETC. V. HAX ET AL. (TWO CASES).

1. **SALE OF CHOSE IN ACTION ON EXECUTION.**—By statute the mortgagor's interest in land is made subject to execution sale. And the mortgagee, as well as a stranger, may subject this interest to the payment of an independent debt.
2. **CONSTRUCTIVE NOTICE OF MORTGAGE LIEN.**—The recording of a mortgage, regular in form and correctly describing the property incumbered, operates as constructive notice to third persons of the lien created thereby.
3. **PLEADING—AVERMENTS AND ISSUES.**—The denial in a pleading of "legal notice * * * so as in any way to affect * * * the title derived," etc., does not put in issue the allegation of notice in the pleading answered.

Appeal from District Court of Arapahoe County.

IN the year 1882 Catherine Caspar, being indebted to appellees in the sum of \$2,000, executed four promissory notes for \$500 each, payable in three, six, nine and twelve months, respectively. To secure these notes she also gave a mortgage upon eight lots in the city of Denver, which mortgage was at the time duly filed for record with the clerk and recorder of Arapahoe county. At the time of the foregoing transaction four of the said lots were already incumbered by a trust-deed. The four lots thus incumbered were afterwards sold to satisfy the indebtedness secured by the trust-deed.

In 1884 appellees obtained a judgment against Caspar for a separate and distinct indebtedness. In July of said year, under said judgment, execution was duly levied upon the four lots covered by the mortgage. They were sold at sheriff's sale, and Gartner, one of the appellees, became the purchaser thereof. In August, 1884, the mortgage notes being due and unpaid, appellees began suit to obtain judgment thereon, and to foreclose their mortgage against the property. In 1885, while said foreclosure suit was still pending, Bentley, who was im-

pleaded in the present suit, obtained a judgment against Caspar for the sum of \$85.53. After the expiration of six months from the date of the execution sale above mentioned, at which Gartner became the purchaser, Bentley, as an execution creditor, redeemed, under the statute, from that sale. His execution was then levied upon the property. It was sold by the sheriff. He became the purchaser, and ultimately received his sheriff's deed.

In September, 1886, a judgment of foreclosure was rendered in the mortgage proceedings, and the real estate ordered sold, in pursuance thereto, to satisfy the debt, then amounting to \$2,893.75. On the 12th of October, 1886, Bentley sold and conveyed by deed to appellant Seaman the interest acquired by him under his sheriff's deed.

On the 25th of October, 1886, the present action was instituted, Caspar, Seaman and Bentley being made parties thereto. The object was to obtain a decree which should in effect remove the cloud cast upon the title by reason of the Bentley execution sale and the Seaman purchase, so that upon sale under the decree of foreclosure the purchaser's title might be perfect. Defendants Bentley and Caspar disclaimed. Defendant Seaman answered. A demurrer to his second defense was sustained, and from the order thus entered the first of these appeals was taken, under the act of 1885, no longer in force. Afterwards, Seaman having in the meantime amended his answer, upon motion the court found in favor of appellees on the pleadings, and rendered a decree accordingly. To review the latter proceedings and decree the second appeal was taken.

Mr. J. A. BENTLEY, for appellant.

Mr. O. B. LIDDELL, for appellees.

CHIEF JUSTICE HELM delivered the opinion of the court.

These appeals are considered together, as the view of the court, hereafter expressed, is decisive of both.

It is unnecessary to critically analyze the pleadings. The answer contains many supposed denials, and it also sets up supposed affirmative defenses. But we shall address ourselves to the question whether or not the facts that appear in the pleadings, without proper contradiction, warranted the decree rendered by the court below. If we shall discover that the decree was proper under the pleadings as they stood at the time it was rendered, no error was committed by the court in its ruling upon the demurrer to the second defense.

Though the mortgage originally described eight lots, the sale to a third party in satisfaction of a prior trust-deed entirely divested of its value the mortgagees' lien upon the four lots sold; and their security was narrowed to the remaining four lots, which alone are the subject of the present controversy.

Appellant relies upon the doctrine of equitable estoppel, *i. e.*, an estoppel created by the conduct of appellees. His position is that appellees, by levying execution upon and selling the mortgaged lots, waived their right to enforce the mortgage lien as against him or his vendor; but he cites no case that recognizes such waiver or estoppel under circumstances similar to those before us.

By statute in this state, the mortgagor's interest in land is expressly made subject to execution sale; and there is no doubt but that a stranger to the mortgage might have levied his execution upon the premises in question, and have sold the same to satisfy his judgment. The mortgage lien would not, in such case, have been divested, and the purchaser would have taken title subject thereto. To all intents and purposes, after the issue of the sheriff's deed, he would step into the shoes

of the mortgagor. We know of no reason why the mortgagee has not the same rights in this respect as other creditors. Suppose his mortgage debt is not due. The mere fact that he happens to have a prior lien, given to secure a different debt which has not yet matured, would not, either upon principle or authority, prevent his proceeding in the premises as any other judgment creditor.

The mortgagee must not make a fraudulent use of his superior lien, secrete its existence, or otherwise mislead others to their disadvantage; but the mere isolated fact that he, instead of another, subjects his mortgagor's remaining interest to judicial sale in satisfaction of an independent debt, does not of itself work the estoppel contended for.

The acts of appellees do not constitute a fraud in law; and we scan the record before us in vain for such *indicia* of fraud in fact as will sustain appellant's contention.

Appellees do not appear to have done anything, either by word or act, or by omission to speak or act, tending to mislead or deceive appellant. Their mortgage was regular in form. It correctly described the property, and was duly recorded. Thus all parties were visited with constructive notice of its existence, and the lien created thereby. It was not released of record, and nothing was said or done by appellees to fairly justify an inference that the mortgage notes had been paid. On the contrary, the complaint avers that appellant had notice, when he purchased, that the foreclosure suit was pending. The denial that his vendor, Bentley, had "legal notice" thereof, "so as in any way to affect * * * the title derived," etc., was no denial, even as to Bentley.

We fail to discover in these transactions the essential elements of an equitable estoppel. Defining such ele-

ments, see Bigelow, Estop. (2d ed.) 437; 2 Pom. Eq. Jur. § 805; *Griffith v. Wright*, 6 Colo. 248.

The judgments of the court below in both cases are affirmed.

Affirmed.

MR. JUSTICE ELLIOTT not sitting.

McMICHAEL V. GROVES ET AL.

1. PRACTICE IN SUPREME COURT — EFFECT OF A DISMISSAL OF A WRIT OF ERROR OR AN APPEAL UNDER DIFFERENT STATUTES.— Prior to 1887 the dismissal of a writ of error or an appeal by the supreme court, without express affirmance of the judgment, operated, regardless of the ground relied on, as a nonsuit in the former instance and a discontinuance of the particular appellate proceeding in the latter.
2. SAME.— But under the statute of 1887, in causes brought up for review from the district court, unless the order of dismissal expressly reserves the right, the judgment stands affirmed, and a further review, either by appeal or by error, cannot be had.
3. DISMISSAL OF APPEAL WITHOUT PREJUDICE.— When an appeal is dismissed without prejudice, appellant's right to a writ of error at any time within three years from the rendition of judgment remains.
4. LIABILITY OF SURETIES ON APPEAL BOND.— But unless plaintiff in error procures his *supersedeas* within thirty days after the date of dismissal of his appeal, the sureties upon his appeal undertaking become liable thereon as in case of affirmance.

Error to District Court of Chaffee County.

MOTION to dismiss writ of error.

The facts are sufficiently stated in the opinion of the court. The statutory provisions of the Civil Code, adopted in 1887, referred to, are as follows:

“Sec. 397. The dismissal of an appeal may, by order of the court, be made without prejudice to another appeal or writ of error; but, unless another appeal or *supersedeas* be taken or allowed within thirty days after such

14	540
9a	219
8a	530
14	540
11a	318
14	540
27	284

dismissal, the dismissal of an appeal or writ of error shall operate as an affirmance of the judgment of the trial court, so as to make the sureties upon the undertaking given by the appellant or plaintiff in error liable on such undertaking."

"Sec. 406. Writs of error shall lie from the supreme court to every final judgment of any court of record in this state." * * *

"Sec. 401. A writ of error shall not be brought after the expiration of three years from the rendition of the judgment complained of." * * *

And section 402 provides for the issuance of a *superse-deas* in connection with the writ of error, when ordered by the court, or, if in vacation, by some justice thereof, upon giving a bond provided for in such order.

Messrs. SAM P. ROSE and M. G. CAGE, for plaintiff in error.

Mr. C. S. LIBBY, for defendants in error.

CHIEF JUSTICE HELM delivered the opinion of the court.

McMichael prosecuted his appeal from a decree rendered against him in the court below. That appeal was dismissed by this court, but no order was entered that such dismissal should be without prejudice to another appeal or a writ of error. Subsequently, and after the expiration of more than thirty days from the date of dismissal, he sued out the present writ of error, which was by order of the court, and upon the filing of his bond, duly made a *supersedeas*. The motion now presented is to dismiss the writ of error and discharge the *supersedeas*.

Prior to the year 1887, the dismissal of a writ of error or an appeal, without express affirmance of the judgment, operated, regardless of the ground relied on, as a nonsuit in the former instance, and as a discontinuance

of the particular appellate proceeding in the latter. *Freas v. Engelbrecht*, 3 Colo. 377; *Monti v. Bishop*, id. 605.

Section 397 of the present Civil Code introduces a new rule upon this subject. It provides that "the dismissal of an appeal may, by order of the court, be made without prejudice to another appeal or writ of error." That is, unless the order of dismissal expressly reserves the right, the judgment stands affirmed, and a further review, either by appeal or by error, cannot be had. This is the obvious design and consequence of the provision; for it would be idle to declare that the dismissal may by order be made without prejudice, if the intention was to allow a second appeal or a writ of error, the order being silent with reference thereto. And since, at least as to district courts, no constitutional inhibition forbids, effect must in the present case be given to the legislative intent. Under the foregoing view the statute before us does not take away the right to a writ of error conferred by section 406 of the same act. Upon entry of the final judgment in any court of record, the unsuccessful party may take his writ. If, however, he elects to present his case by appeal instead, he voluntarily hazards a review by error; such hazard resting upon the contingency that his appeal may be dismissed without the saving clause relating to prejudice.

When an appeal is dismissed without prejudice, appellant's right to a writ of error at any time within three years from the rendition of judgment remains. See secs. 401, 406, Civil Code. But availing himself of this privilege does not stay proceedings in the trial court pending the review. If he wishes to accomplish this result he must procure a *supersedeas*; and here again, section 397, above mentioned, introduces an important qualification hitherto unknown to the law. Unless plaintiff in error procures his *supersedeas* within thirty days after the dismissal, its functions are materially curtailed;

for the sureties upon his appeal undertaking nevertheless become and remain liable thereon as in case of affirmation.

The statutory provision under consideration is in some respects anomalous, but its language is reasonably plain, and the courts may not, by construction, change its effect.

We are obliged to sustain the motion before us. Since the appeal was not dismissed "without prejudice," the writ of error did not lie. This proceeding is accordingly dismissed, and, in pursuance of such dismissal, the *supersedeas* must, of course, be discharged.

Writ of error dismissed.

GUTSHALL V. HELM.

APPEAL — ASSIGNMENT OF ERRORS.— Where the verdict is sustained by the evidence, and the charge to the jury is correct, the judgment will be affirmed.

Appeal from District Court of Lake County.

Mr. A. W. STONE, for appellant.

Messrs. RUCKER & EWING, for appellee.

REED, C. This suit was brought by appellee (plaintiff) against the appellant (defendant) to recover the amount due on three several promissory notes. The notes were made by the defendant, and payable to the order of the plaintiff. There was no question in regard to the consideration for which the notes were made, nor as to the amount due upon them. Their execution was admitted. The defendant, by answer, set up several matters as set-offs and counter-claims. The testimony regarding them was conflicting and contradictory. No errors are assigned to the admission or rejection of testimony. Exceptions

544 WENDLING C. & L. CO. v. WOODBURN. [April T.,

to the charge of the court to the jury were not reserved in such manner as to entitle them to be reviewed on appeal. *Keith v. Wells*, ante, p. 321. An examination of the charge, however, shows it to have been substantially correct as to the law of the case, fair, clear and easy to be understood. The questions to be determined by the jury were those of fact. There was sufficient evidence to warrant the finding. It was not against the weight or preponderance of evidence, hence it should not be disturbed; and, the instructions being substantially correct, as above stated, the judgment should be affirmed.

RICHMOND and PATTISON, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

Affirmed.

WENDLING CATTLE & LAND CO. v. WOODBURN.

REVIEW — WEIGHT OF EVIDENCE.— Where the evidence was conflicting, and the findings of the trial court were not manifestly against the weight thereof, the judgment will not be disturbed.

Appeal from Superior Court of Denver.

Messrs. T. D. W. YONLEY and I. N. STEVENS, for appellant.

Messrs. COE & FREEMAN, for appellee.

RICHMOND, C. In this action, plaintiff, appellee herein, seeks to recover the sum of \$1,500, with interest thereon from the 1st day of October, 1886, balance due as purchase price of an undivided one-half interest in certain cattle, horses, ranch, water-rights and improvements.

The complaint alleges that on or about the 9th day of April, A. D. 1886, the plaintiff sold and delivered to the

defendant all his undivided one-half interest in and to all of the cattle branded O. K. and I O U and all horses branded O. K. on the left hip, also his interest in and to the O. K. ranch, in Mora county, N. M., with all water-rights and improvements thereon, at an agreed price of \$30,000; that defendant promised to pay therefor the sum of \$15,000 on the 1st day of July, A. D. 1886, and \$15,000 on the 1st day of October, A. D. 1886; that defendant paid the sum of \$15,000 on the 1st day of July; and that, although plaintiff demanded on the 1st of October, 1886, the further sum of \$15,000, defendant refused and failed to pay the same.

By the answer to this complaint, defendant alleges that the sole and only consideration of the said \$30,000 was a certain contract entered into between the plaintiff and defendant on the 9th day of April, 1886, wherein and whereby, in consideration of the sum of \$30,000, \$15,000 thereof to be paid by defendant to said plaintiff on the 1st day of July, 1886, and the balance of said sum of \$30,000 to be paid October 1, 1886, the plaintiff agreed to sell and deliver his undivided one-half interest in all cattle bearing the O. K. and the I O U brands, and all horses branded O. K. on the left hip, then belonging to the firm of Maulding & Woodburn, of Mora county, N. M., also the ranch known as the "O. K. Ranch," situate in said county, New Mexico, together with two or more claims of water-rights; that said first instalment of \$15,000 was duly paid; and that it was further understood and agreed between the parties that the plaintiff should, on or before the maturity of payment of the last \$15,000, execute and deliver to defendant a deed for said ranch and water-rights, and that the said cattle should number at least as many as one thousand five hundred, and said horses should number at least eighteen head, and that said plaintiff would, on or before the maturity of the said last \$15,000, furnish to said defendant the tally of said cattle, and would, on or before the maturity

of the said last payment, deliver to the defendant the number of one thousand five hundred head of cattle, upon the said ranch; that the plaintiff has not made or executed the deed of conveyance or other title to the ranch and water-rights, but has wholly refused to deliver said tally, and did not deliver to the defendant one thousand five hundred head of cattle, but only delivered one thousand head.

Plaintiff replies, specifically denying the matters contained in the answer.

The sole issue presented in the court below was whether or not the plaintiff had contracted to make the deed of conveyance of the ranch, with the water-rights, and to deliver fifteen hundred or more head of cattle, and eighteen head of horses, and to tally the cattle before the last payment.

The cause was tried to the court, and the findings of the court were favorable to the plaintiff; upon the findings, judgment was rendered in favor of plaintiff and against defendant for the sum of \$15,000 and \$375 interest. To reverse this judgment, defendant prosecutes this appeal.

The arguments of both parties are addressed exclusively to the issue as above set forth, and appellant urges that the evidence does not support the findings. The plaintiff contends that, at the time of the contract of purchase, he sold the cattle upon the range by the brands, and only such interest as he had in the ranch and water-rights, which was that of a squatter's interest.

It is wholly unnecessary for us to incorporate into this opinion a lengthy abstract of the testimony. The rule of this court is: "Where the evidence is conflicting, and the findings of the trial court are not manifestly against the weight of the evidence, the judgment will not be disturbed." *Ullman v. McCormic*, 12 Colo. 553. A careful review of the evidence satisfies us that there was sufficient proof to warrant the findings of the court. On the

part of plaintiff, written and oral proof was introduced. The first exhibit is in the figures and words following:

"Denver, Colo., April 14, 1886. It is hereby agreed by and between T. F. Maulding and the Wendling Cattle and Land Company that T. F. Maulding shall purchase for said company, of John K. Woodburn, his (Woodburn's) undivided half interest in the Maulding & Woodburn Cattle and Ranch Property, situated in Mora, New Mexico, including all of said Woodburn's said interest in the O. K. brand, at a cost not exceeding \$30,000, and on the following terms, to wit: \$15,000 to be paid by the said Wendling Cattle and Land Company on the first day of July, 1886, and \$15,000 on the first day of October, 1886. T. F. MAULDING. By E. F. LAMB, President of Wendling Cattle and Land Company. [Corporate seal of the Wendling Cattle and Land Company.] Attest: S. S. SMYTHE, Secretary."

Maulding testifies that, in pursuance of the above paper, he purchased Woodburn's undivided one-half interest for \$30,000, and agreed to pay, as that article states, \$15,000 on the 1st day of July, and \$15,000 on the 1st day of October, and that Woodburn turned over all of his interest in cattle of the O. K. and I O U brands, and all horses and ranches, executing a bill of sale therefor, and that he was satisfied at the time of the purchase that he received between fifteen hundred and two thousand head of cattle, and eighteen horses and two mules, and that the ranches were turned over to the company, since which time, and up to the present day, the defendant company has been in the possession of them; that, at the time of the purchase, he understood the character of the plaintiff's claim to the ranches, and it appears from his testimony that no agreement was entered into whereby plaintiff contracted to make deeds, or to deliver any precise number of cattle, or to tally the cattle. The bill of sale is in words and figures as follows:

"Pinion Ranch, April 29, 1886. This is to certify that

I have this day bargained, sold and delivered to the Wendling Land and Cattle Company, of Colorado, for and in consideration of the sum of thirty thousand (\$30,000) dollars, one-half payable July 1, 1886, and the balance payable October 1, 1886, all of my undivided half interest in all cattle bearing O. K. and I O U brands, and all horses branded O. K. on left hip, now belonging to the firm of Maulding & Woodburn, of Mora county, New Mexico, also the ranch known as the 'O. K. ranch,' situated about fourteen miles from Wagon Mound, Mora county, New Mexico, together with two more claims of permanent water, situate on same arroyo just below said ranch. JOHN K. WOODBURN."

Maulding was the agent of the company to negotiate and complete this purchase. He was the manager of the company's interests in New Mexico, and his contract of purchase was subsequently ratified by the payment of the first \$15,000, and taking possession of the stock and ranches. No claim of the nature embraced in the answer appears to have been spoken of to plaintiff until after October 10, 1886. This is evidenced by President Lamb's letter of date September 20, 1886, to plaintiff, and is supported by the testimony of the plaintiff, and by circumstances of a corroborative character testified to by witnesses on the part of the defendant.

Our conclusion is, the judgment should be affirmed.

PATTISON and REED, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

Affirmed.

GREELEY IRRIGATING CO. ET AL. V. HOUSE.

14 549
15 432

1. **DAMAGE BY ESCAPING WATER FROM IRRIGATING DITCH — STATUTORY LIABILITY OF DITCH OWNERS.**— Where owners of an irrigating ditch recklessly attempted to convey a volume of water through it far beyond the reasonable capacity of the ditch to safely carry, and in so doing knowingly caused the ditch to overflow its banks, thereby flooding the land of an adjacent proprietor, and destroying his fruit trees and vines growing thereon, they became liable to respond in damages under General Statutes, sections 312, 1728, 1788.
2. **UNAVOIDABLE ACCIDENT AS A DEFENSE.**—A defense based on unavoidable accident is not available where it already appears that the gross carelessness and negligence of the defendants contributed to the injury complained of.

Appeal from District Court of Weld County.

Messrs. J. M. FREEMAN and C. A. BENNETT (RALPH TALBOT, of counsel), for appellants.

Messrs. H. N. HAYNES and J. W. MCCREARY, for appellee.

RICHMOND, C. This action was brought to recover damages resulting from the alleged negligence of defendants, appellants herein, in the use and maintenance of an irrigating canal. By the complaint it is alleged that the plaintiff, appellee herein, was the owner of a certain lot of land in the city of Greeley, upon which she had set out apple trees, raspberry canes and strawberry plants; that the defendants, the Greeley Irrigating Company and the city of Greeley, were the owners of, and were operating, an irrigating ditch known as "Canal No. 3;" that said irrigating ditch was constructed along and near the premises of plaintiff; that on or about June 16, 1885, the defendants negligently and wrongfully caused and permitted the water to run in said canal bank full and beyond the capacity of said canal to carry water; that, solely by reason of the negligence and wrongful management of said canal by said defendants, the water over-

flowed the banks thereof and flowed down a steep decline upon land below, forming a pond of about five acres in extent and about two feet deep, from which point the water gradually flowed and found its way through the intervening land to and upon the land of plaintiff; that about three acres of plaintiff's land became submerged, and so remained submerged for a period of about two months, which resulted in the destruction of the apple trees, raspberry canes and strawberry plants, to plaintiff's damage in the sum of \$1,340.

The defendants answer, denying negligence, or that they caused or permitted the water to run in said canal beyond the capacity of said canal to safely carry water. They admit that on or about the 16th of June, 1885, there was a breach or washout in the bank of their said canal, but deny that it was of the extent alleged in the complaint, and aver that the stream of water which flowed through the breach ran down a steep decline, and into a pond which had existed long prior to the 16th of June, 1885; that said pond is the identical pond or submerged area mentioned in plaintiff's complaint; and further aver that the break was an unavoidable accident caused by gophers burrowing in the bank; that no degree of skill or foresight of defendants could have prevented the same; and deny that any water from said canal, on account of said break, ever found its way upon the land of plaintiff, or that plaintiff was damaged on account of said break in said canal.

Plaintiff replies to the answer, and denies that the breach was an unavoidable accident, or that it occurred without fault of defendants, or was caused by the burrowing of gophers in the bank of the canal.

The cause was tried to a jury, who returned a verdict against defendants for the sum of \$750. Motion for a new trial was denied, and judgment entered against the defendants for the amount of the verdict. To reverse this judgment defendants prosecute this appeal.

There are several assignments of error, but appellants in their brief discuss but two: "(1) That the verdict was contrary to the law and the evidence; (2) that the court erred in its instructions to the jury."

The testimony tends to prove that appellee's property was seriously injured. Apple trees, raspberry canes and strawberry vines, with the growing fruit thereon, were destroyed by means of the water escaping from the irrigating canal owned and managed by appellants.

E. P. House, testifying on behalf of the plaintiff, says that four days prior to June 17, 1885, the ditch had been running bank full of water, or within an inch and a half of the top; that on Saturday, June 13th, he informed the superintendent, Levi Cole, of the danger, and expressed to him his apprehensions of serious injury to his wife's property; that Cole replied: "I have been ordered by the trustees to run the ditch bank full until they get through irrigating," to which House remarked, "It will burst pretty soon, and drown us out." Cole responded that he "did not care if it flooded the whole damn town; the trustees would have to pay the damages." House testified to a further conversation, in which Cole stated that two of the trustees of the irrigating company, J. E. Davis and Dr. Camp, were urging him to supply more water, and that Cole informed them that the water was running as high or higher than the ditch would safely carry, and mentioned a break west of appellee's land, and another break above the land of Alex. Moore. The trustees replied that they wanted him to run more water to them, if it broke the ditch from one end to the other.

Joseph Stowell testified that Supt. Cole had said a day or two before the break: "I know I am running too much water, but I have to obey orders of those fellows on the delta."

Charles Nichols testified on behalf of plaintiff that on the morning on which the break occurred the main ditch was running as much as the bank would carry. At his

place they had to lay down planks to get to the stable, owing to the water running out of the ditch, and flooding between his house and barn. "The water came to the top of the ditch bank at our place, and overflowed. The water at the break was running over the top of the bank, and ran for about two feet before it reached the hole." Superintendent Cole, on cross-examination, testified that on Sunday, immediately preceding the break, he went to the head-gates of the defendants' ditch in company with Dr. Camp, one of the trustees of the company, and raised the head-gate a trifle. This was the next day after Mr. House had called his attention to the fact that he was running the ditch too full, and that he was afraid the ditch would break. That he raised the head-gate, at the request of Dr. Camp, and expressed the opinion that the ditch was running then as full as it would stand. That Dr. Camp replied, "I think we will try a little more water." If, instead of raising the head-gate, he had lowered it, it would have had a tendency to prevent danger from a certain rise in the river, or the ditch becoming too full. Various exhibits were introduced at the trial of the cause, and the attention of witnesses were directed to these exhibits, and the exact locality of the break was pointed out to the jury. Several witnesses testified on behalf of the plaintiff in addition to those above named; and their testimony, as we view it, tends to support the testimony of House, Nichols and Stowell. Superintendent Cole, as far as the abstract discloses, does not deny having used the language testified to by House. This and other testimony, it seems to us, was amply sufficient to warrant the jury in finding for the plaintiff.

Section 312, General Statutes, 1883, provides as follows: "Every ditch company organized under the provisions of this act shall be required to keep their ditch in good condition, so that the water shall not be allowed to escape from the same to the injury of any mining claim,

road, ditch or other property. * * *” Section 1728, id., provides that “the owner or owners of any ditch for irrigation or other purpose shall carefully maintain the embankments thereof, so that the waters of such ditch may not flood or damage the premises of others. * * *” Section 1733, id., provides that the “owner of any irrigating or mill ditch shall carefully maintain and keep the embankments thereof in good repair, and prevent the water from wasting.”

It is admitted by appellants in argument that the above sections of the statute, properly construed, impose upon the owners a duty, and that “every ditch company is required to keep their ditch in such good repair and condition that the water of the same cannot readily and easily escape therefrom to the injury of any property; and especially such owners must not allow or permit the water to escape therefrom to the damage of other property.”

Accepting this admission as being the true interpretation of the spirit and purpose of the sections above referred to, one cannot escape the conclusion that the plaintiff is entitled to recover for such injuries as resulted from negligence of defendants in the use and maintenance of the ditch. True it is that in the maintenance of the ditch the defendants were engaged in a lawful pursuit, and it is not necessary for us to extend the operation of these provisions beyond appellants' admission, so far as this case is concerned. The conclusion of the court in *Ditch Co. v. Anderson*, 8 Colo. 131, was that, for injuries resulting from an exercise of lawful power in an improper, careless or negligent manner, a remedy may be had. *Water Co. v. Middaugh*, 12 Colo. 443 (of opinion); 1 Thomp. Neg. 101.

It can, without doubt, be said that the defendants are responsible for any damage occasioned to plaintiff's property by reason of their failure or neglect to keep the ditch in a state of preservation and repair, and to so

maintain and manage the ditch as to prevent injury to plaintiff's property while they so use and control the same; and for any injury to the plaintiff's property caused by overflow of the waters entering the ditch, resulting either directly or indirectly from the negligence of defendants in keeping the same in good repair, or in the manner of its use while under their control, they are responsible in damages. *Richardson v. Kier*, 37 Cal. 263.

If there was a failure on the part of the defendants to comply with an express requirement of the statute in the construction, maintenance or use of this irrigating ditch, whereby injury resulted to the plaintiff, there can be no question but plaintiff is entitled to recover. In *Wilson v. Turnpike Road*, 21 Barb. 68, it was held that an "omission to comply with the statutory requirement is a nuisance for which a party injured without negligence on his part may claim damages. *City of Pekin v. Newell*, 26 Ill. 320."

The evidence and the authorities above recited satisfy us that the findings of the jury in this case were not contrary to the law and the evidence.

The next question presented for our consideration is the alleged error in the instruction of the court to the jury. In support of this contention the appellants call our attention to a certain portion of the charge given to the jury by the judge, and insist that it was wholly unwarranted by the evidence and by the law. It is a matter of no great difficulty for one to extract certain portions of a charge given by a trial judge, and to argue that such portions were wholly unwarranted by the law and the evidence in the case. The rule of this court, established by a number of cases, is, however, that the charge should be considered as a whole; and, when so considered, if it shall appear that the jury could not have been misled thereby, the cause will not be reversed.

We will consider the instruction under this rule. It is insisted that the court erred in not charging that the

defendants were only liable for want of ordinary care and diligence in maintaining the banks of their ditch, and the flow of water therein, and that by the charge he imposed an additional burden upon the defendants, who were carrying on a lawful enterprise of public necessity. The court, in substance, instructed the jury that, under the provisions of the statute, it was the duty of the defendants to keep their ditch in good condition, so that the water shall not be allowed to escape from the same to the injury of other property; that the object and intention of the various provisions of the statute is that, while ditch companies in towns and cities have a right to have irrigating ditches constructed, and to maintain and operate them, yet they must see to it that they so construct the banks of their ditches, and that they so operate and maintain the ditches, that the water thus found in the artificial channels shall not escape over or through the banks of the ditch and flood the premises of others, and do damage and injury to the property of others; and if, by reason of the negligence of the defendants in this case, either by leaving the banks in an improper condition, or by reason of suffering the water to run at so great a height that it would be liable to break over even good embankments, a quantity of water either great or small, provided it was of sufficient volume to do considerable damage, did so escape from defendants' irrigating ditch and flooded the premises of plaintiff, and injured her property, then she is entitled to recover from defendants the amount of damage that she thereby sustained. Further, that the burden of proof was on the plaintiff to show that this water broke through by the mismanagement or imperfect construction, repair or management of the ditch, and damaged property of the plaintiff; and the burden devolves upon the plaintiff to show the amount of damage to her property, or the value of the property destroyed.

Taking the charge to the jury as a whole, we are unable to escape the conclusion that the court instructed the jury correctly. It seems to us that the judge particularly called the attention of the jury to the fact that the plaintiff's right of recovery was based upon the negligence of the defendants, and that it was the duty of the plaintiff to prove to the satisfaction of the jury the extent of such negligence and the value of the property destroyed by reason of such negligence. The instruction, taken as a whole, does not go beyond the admitted liability of the defendants in appellants' brief. It does not extend the liability beyond the limits of the statute. It does not go to the extent of saying that a non-compliance with the statutory requirements is a nuisance, and a party injured thereby may recover his damages without proof of negligence, as was held in *Wilson v. Turnpike Road* and *City of Pekin v. Newell*, *supra*.

In reference to the defense based upon the claim that the accident was unavoidable and occurred wholly without fault on the part of the defendants, but resulted from the burrowing of gophers in the banks of the canal, it is sufficient to say that it is contrary to the testimony. The evidence shows that the defendants were grossly negligent; that they wholly disregarded timely warnings as to the inevitable result of their conduct in attempting to carry water beyond the capacity of the ditch; and, being themselves in fault, they cannot be permitted to take refuge under the plea of unavoidable accident.

The question of negligence was a question for the jury. It was for them to determine whether the defendants had kept, maintained and used the ditch according to the spirit and intent of the statute; and we are not prepared to say, after a careful review of the testimony embraced in the abstracts furnished by appellants and appellee, that their conclusion was incorrect. Satisfied as we are that the evidence warranted the verdict, and

that the jury were not misled by the instructions of the court, we think the judgment should be affirmed.

REED and PATTISON, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

Affirmed.

MR. JUSTICE ELLIOTT, having presided at the trial in the cause below, did not sit in this cause.

KARCHER V. PEARCE.

CHANGE OF VENUE — PREJUDICE OF JUDGE.—It is no ground for a change of venue in a civil case that the judge had formerly represented the people as prosecuting attorney in a criminal prosecution against defendant, and had been counsel for the plaintiff in a civil suit against him.

Appeal from Douglas County Court.

Messrs. BROWNE & PUTNAM, for appellant.

Messrs. J. A. BENTLEY and J. W. FARRELL, for appellee.

RICHMOND, C. This action was originally brought before a justice of the peace, and thereafter appealed to the county court, where the appellant, defendant below, filed an application for a change of venue, which application was based upon the following affidavit:

“John B. Karcher makes oath and says that he has just grounds to fear and does fear that he cannot and will not receive a fair trial in said county court wherein said cause is now pending, because the Honorable Amos G. Webster, judge of said county court, was attorney for the people (and is prejudiced against the affiant) in a certain prosecution against affiant before Charles E. Lowell,

justice of the peace in said county, in the year 1886, and appeared against this affiant in the trial thereof; and also that the said judge was counsel for one Clay in certain litigation between him and this affiant during the past few months, and before his election as judge of said court. Wherefore affiant prays for change of venue in pursuance of the statute in such cases made and provided."

The application for a change of venue was denied. Thereafter defendant and his attorney withdrew their further appearance in the case. The court thereupon heard the testimony of the witnesses in behalf of the plaintiff, and rendered judgment against the defendant for the sum of \$252.44, to reverse which judgment appellant prosecutes this appeal.

The sole ground relied upon by appellant is error of the court in overruling the motion for change of venue. The affidavit states no statutory grounds for a change of venue, and is wholly insufficient to warrant this court in interfering with the ruling of the court, under the discretion vested therein by the statute touching applications of this character. *De Walt v. Hartzell*, 7 Colo. 602.

The mere fact that an attorney, in his professional capacity, formerly prosecuted an individual in a civil or criminal action, creates no presumption that such attorney is prejudiced against such individual in any other matter. The judgment should be affirmed.

PATTISON and REED, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

Affirmed.

FITZGERALD V. BURKE.

1. **PLEADING INSUFFICIENT DEFENSES — REPLICATION UNNECESSARY.**— A plea in an action on a written contract setting up a contemporaneous parol agreement inconsistent with the written contract is insufficient, and requires no replication.
2. **SAME — DEFENSE OF RECOVERY AGAINST A JOINT OBLIGOR NO BAR WITHOUT ALLEGATION OF SATISFACTION OF JUDGMENT.**— A plea that the contract sued on is joint and several, and that plaintiff has already recovered judgment against one of the joint and several obligors in another suit, but not alleging satisfaction of the judgment, is insufficient to constitute a defense.
3. **NECESSARY PARTIES — WAIVER.**— Objections for defect of parties must be raised either by demurrer or answer, and if not so raised they are waived.

14	559
15a	98
14	559
80	288
14	559
33	425
14	559
20a	350

Appeal from Pitkin County Court.

ACTION upon written contract for sinking shaft upon mining property belonging to the defendant and others. The complaint alleges the making of the contract, which is given in full in the opinion of the court; and it is further alleged that plaintiff completed the shaft as per contract on the 31st day of August, 1885, at which time he claims there was due him from the defendant as his proportion the sum of \$332, of which amount no part has been paid except the sum of \$90. Prayer for a judgment, and lien for the balance.

The appellant in his answer admits the ownership of the mining claim, as alleged in the amended complaint, and that he is the owner of an undivided one-fifth interest in said lode. He also admits that on July 31, 1885, each of the persons named entered into a contract in writing with plaintiff, and delivered the same to him, but says, as to the exact nature and terms of said contract, this defendant has no knowledge or information upon which to base a belief; that he is ignorant of the terms of said contract, and craves oyer of the same.

All other allegations of the complaint are put in issue by this answer. And for a further answer appellant sets

up a contemporaneous oral agreement, and for a still further and separate answer says "that the plaintiff ought not to have the recovery of anything in this action, nor further prosecute this suit, for the reason that the contract sued on in this case is a joint and several contract of all parties named as owners of said Franklin lode, and that plaintiff has already sued one of the joint and several obligors named in said contract in this court, and has recovered judgment for the violation of said contract; such judgment being rendered in a certain suit lately pending in this court wherein James Burke is plaintiff and J. E. Eames is defendant."

Afterwards appellee moved to strike out appellant's second and third defenses, which motion the court overruled; and, appellee failing to reply to these defenses, a default was entered against him, but the court refused appellant's motion to enter judgment in his favor upon the pleadings. In this state of the pleadings the parties went to trial before the court without a jury. Appellee introduced witnesses in support of his complaint, but no testimony was offered by appellant. The trial resulted in a judgment for the plaintiff in the sum of \$264.65, and decree for a lien. The defendant, having reserved his exceptions, brings the case here for review upon appeal.

Messrs. DOWNING & FRANKLIN, for appellant.

Messrs. J. E. ROCKWELL and F. G. SALMON, for appellee.

MR. JUSTICE HAYT delivered the opinion of the court.

The first two assignments of error are predicated upon exceptions taken to the rulings of the court anterior to the filing of the amended complaint. These assignments have not been alluded to in the argument filed upon appeal, and we need not further consider them. The amended complaint superseded the original, and upon

this pleading, with the answer thereto, appellant, at the trial, moved for judgment, which motion was overruled by the court, and the ruling is made the basis of the third assignment of error; the contention of the appellant being that, as no replication was filed either to the second or third defenses, the new matter alleged in those defenses must be taken as true, and that the defendant was entitled to a judgment upon the facts so admitted. We are clearly of the opinion, however, that the matters pleaded in such defenses did not constitute a defense to the action.

The second defense is clearly insufficient. In this defense the execution of the written contract is admitted in this language: "At the time of the execution of the contract set up in the complaint the plaintiff and defendant agreed," etc. And this is followed by the statement of an alleged contemporaneous parol agreement, wholly inconsistent with the written contract. This constituted no defense to the action. The principle is elementary that the terms of a valid written instrument cannot be varied or contradicted by a contemporaneous oral agreement. 1 Add. Cont. *199; Whart. Ev. § 920.

The third defense was no better. It admits that the contract sued upon is a joint and several contract. It is expressly so made by statute. Upon such a contract the plaintiff could sue all parties jointly, or each or all of the parties severally, for the whole amount due, and a recovery against one without satisfaction would be no bar to a suit against the others. To constitute a bar it must be shown that the judgment had been fully satisfied, and a plea stopping short of this is not good. Therefore, the court below committed no error in refusing to enter judgment upon these pleas. Freem. Judgm. § 235; *Hix v. Davis*, 68 N. C. 233; *McReady v. Rogers*, 1 Neb. 124; *Elliot v. Porter*, 5 Dana, 299; *Harlan v. Berry*, 4 G. Greene, 212.

By the fourth assignment of error the ruling of the
VOL. XIV —

court upon the defendant's motion to dismiss the case after plaintiff's testimony was introduced is questioned. The motion was based upon the assumption that the plaintiff could not alone maintain the action, but that the witness John Burke should have been joined as a co-plaintiff, because the testimony showed that said Burke had an interest in the contract. The nature of such interest is not shown. Burke did not sign the contract, and was not a party to it, but became interested in the work with the plaintiff some time after the execution of the written contract. He is not shown to have been a necessary party to the action. Aside from this, it was too late to raise this question at the trial. A defect of parties must be raised either by demurrer or answer, and if not so raised it is waived. Secs. 55, 59, 60, Code 1883; *Great West Min. Co. v. Woodmas of Alston Min. Co.* 12 Colo. 46; *Crouch v. Parker*, 56 N. Y. 597; *Lewis v. Greider*, 51 N. Y. 231.

The fifth and sixth assignments of error relate to the admission of the written contract in evidence and the admission of oral testimony to show that the liability of the parties thereto was several instead of joint and several, and these may be considered together. The written contract is marked "Exhibit A," and is as follows:

"Witness this agreement, made and entered this 31st day of July, between John Canning, James Fitzgerald, Thomas Hynes, John Eames, Wm. Doeltz, H. H. Gilman, Thomas J. Duncan, Frank X. O'Brien, parties of the first part, and James Burke, party of the second part. Parties of the first part, being the owners of the Franklin mining claim on Aspen mountain, undertake and agree to pay to the party of the second part twenty dollars (\$20) per foot to sink said Franklin shaft to a depth of four hundred feet, said shaft being down at the present time to a depth of three hundred and seventeen feet.

"And the second party agrees to sink the same, and

also to timber and partition said shaft to said depth, in a good, workmanlike manner; also, to have said shaft perpendicular; parties of the first part to furnish lumber for lining said shaft. And the party of the second part further agrees to carry down said shaft the dimensions that it now is. And the parties of the first part agree to pay to the party of the second part on completion of the first fifty feet seventy-five per cent. of the same, retaining twenty-five per cent. until the completion of this contract; and it is expressly understood and agreed between the parties of the first part and the party of the second part that the latter party will hire two competent engineers to take charge of and run the engine that is now in said Franklin mine.

“And it is further agreed between both parties that the party of the second part shall continue to work three shifts until said contract is finished. JAMES BURKE. PATRICK FITZGERALD. JOHN C. EAMES, 1-5. Witnessed: ANNA H. CANNING, 1-10. [Seal.] By JOHN K. CANNING. JAMES FITZGERALD, 1-5. [Seal.] H. H. GILMAN. [Seal.] By CHARLES BURNS, 1-10. THOMAS J. DUNCAN. [Seal.] By CHARLES BURNS, 1-10. [Seal.] FRANK X. O'BRIEN. By CHARLES BURNS, 1-5. [Seal.] THOMAS HYNES, 1-20. WILLIAM F. DOELTZ, 1-20.”

The assignment of error based upon the admission of the instrument has not been pressed in this court. If it had been, it could not have availed, as the authority of Canning and Burns to execute the contract for and on behalf of the parties for whom they claimed the right to act at the time having been shown, and also the due execution and delivery of the contract, the instrument was properly admitted in evidence.

It is shown by undisputed evidence that at the time of the institution of this suit there was due the plaintiff upon the contract an amount equal to the amount for which judgment was obtained below, the only question being as to whether one or all the defendants were lia-

ble for this amount. We have seen, however, that under the statute the parties denominated in the contract "parties of the first part" are both jointly and severally liable for the full sum due under the contract, and being so severally liable, plaintiff was entitled to a judgment against Fitzgerald for the entire amount.

Permitting appellant to introduce evidence tending to show that the figures appearing after the names of the parties were appended for the purpose of showing the interest which each held in the mining claim, and to limit the liability of each accordingly, if error, was entirely harmless. If plaintiff succeeded upon the proof, then the defendant was liable for one-fifth of the contract price; if he failed, the defendant, as one of several jointly and severally liable, was liable for the entire amount due the plaintiff upon the contract, which was still but one-fifth of the total amount earned by plaintiff, as the remaining four-fifths had been paid him prior to suit. The same result would follow in either case. Appellant could not, therefore, have been prejudiced by the evidence.

The seventh assignment of error has not been argued by counsel. It is in relation to the admissibility of certain evidence, which is not set forth in the printed abstract, as required by the act of 1885, under which the appeal was taken. It will not, therefore, be considered. *Halsey v. Darling*, 13 Colo. 1.

By the eighth and last assignment it is claimed that the court erred in rendering judgment for the plaintiff. The views already expressed show that the plaintiff was entitled to recover. The judgment is accordingly affirmed.

Affirmed.

STEVENSON V. PALMER ET AL.

1. LIEN OF ATTACHMENT NOT DESTROYED BY RELEASE OF PROPERTY UPON A FORTHCOMING BOND.—Under our statute the lien of an attachment is not destroyed by the delivery of the attached property to the defendant upon the execution of a forthcoming bond.
2. SURETIES NOT ENTITLED TO THE POSSESSION OF ATTACHED PROPERTY — REPLEVIN.—When the release of attached property has been procured by giving a forthcoming bond, the sureties upon such bond are not by reason of their suretyship entitled to the possession of the property, and cannot therefore maintain the action of replevin.

14	565
4a	152
14	565
9a	476
14	565
d14a	58
14a	59
14a	60
14a	61
14a	66
14a	70
14a	71
14a	73
14	565
81	204
81	205

Appeal from Superior Court of Denver.

UPON the 1st day of August, 1887, Emma C. Whitsett brought suit in a justice's court against Frank F. Noxon, in which suit a writ of attachment was issued by the justice, and levied by appellant, as constable, upon the goods here in controversy. Soon after the levy, appellees herein, Peter L. Palmer, John W. Horner, Frank F. Noxon and Dora Noxon, caused the property to be released by giving a forthcoming bond, as provided by statute, and Noxon again went into possession of the goods, when they were again levied upon by appellant under a writ of attachment issued at the suit of one P. O. Gaynor against said Noxon. In this suit a forthcoming bond was also given, signed by Frank F. Noxon, Peter L. Palmer and E. S. Fisk. In the suit instituted by Gaynor against Noxon, the plaintiff having obtained judgment in his favor, Noxon delivered the goods to the constable, Stevenson, upon the execution issued in that case. Thereupon appellees, who were sureties upon the forthcoming bond in the first suit, demanded the goods, and, upon the constable refusing to give them up, brought this action of replevin for their recovery, while the Whitsett suit was yet pending and undetermined.

The present suit was originally commenced in a justice's court, and from thence taken by appeal to the su-

perior court of the city of Denver. The trial in the latter court resulted in a judgment in favor of appellees for the possession of the property, and directing its return, or, in case such a return could not be had, then appellees to have and recover of and from appellant its value, which was adjudged to be \$150, and also for costs.

Mr. W. J. WEEBER, for appellant.

Mr. P. L. PALMER, for appellees.

MR. JUSTICE HAYT delivered the opinion of the court.

The statute under which the redelivery bonds were both given reads as follows: "The defendant may, at any time before final judgment in the action, release all property which may have been seized by virtue of the attachment writ, by his executing an undertaking as hereinafter provided. Such undertaking shall be given by the defendant to the plaintiff, be signed by two responsible sureties, each a resident of the county in which the suit is pending, and shall be to the effect that in case the plaintiff recover judgment against the defendant in the action, and the attachment is not dissolved, the defendant will deliver to the constable all property which has been seized by him by virtue of the attachment writ, or, on failure so to do, will pay to the plaintiff the full value of the property attached, not exceeding the amount of the judgment and costs recovered in the action." Gen. St. 1883, § 2015.

In case of levy of the writ of attachment, unless a redelivery bond be given, the officer must retain the custody of the property awaiting the result of the attachment proceedings. This is essential in order that the property may be under the control of the court to answer any demand which may be established against the defendant by the final judgment in the case. If the bond be given, the responsibility of the obligors

is substituted for that of the officer for the property attached; the principal object of the bond being to insure the safe-keeping and faithful return of the property attached to the constable, although, in the alternative, the obligors may discharge themselves from their obligation by paying the full value of the property, not exceeding the amount of the judgment and costs in the action. Were it not for this alternative provision, there could be no question as to the continuance of the lien, although the bond be given. The sole condition would then be that the property shall be returned to the constable if plaintiff recover judgment and the attachment be not dissolved. To hold that the property would be liable to execution under such circumstances would be to allow third parties to produce a forfeiture of the conditions of the bond; for a levy would make the performance of the conditions of the bond impossible. And the courts and law writers unite in saying that the property is not so liable. Drake, Attachm. § 331; Wade, Attachm. § 193; Wap. Attachm. 396, 397; *Tyler v. Safford*, 24 Kan. 580; *Roberts v. Dunn*, 71 Ill. 46; *Hagan v. Lucas*, 10 Pet. 401.

"The sheriff, by intrusting the property to the defendant under such bond, does not lose his legal possession of it. The defendant holds under the sheriff, so that the *res* is still in the constructive possession of the court. The ancillary proceeding in the suit does not abate by virtue of the forthcoming bond, which would inevitably be the case were the court to lose its custody and jurisdiction of the property, and the defendant to regain unqualified possession of it." Wap. Attachm. 397.

But where, as with us, the statute provides that the bond is to be given to the plaintiff, and conditioned that the property shall be returned to the officer, or its value paid to the plaintiff, it must be admitted that the authorities are so conflicting as to create some doubt as to the law on the subject. Upon this question Mr. Waples gives it as his opinion that property thus released may

be sold by the defendant, subjected to new attachments by other creditors, or levied upon in execution, in like manner as though the attachment had been dissolved. Id. 401, 402. The author cites several Iowa cases, which undoubtedly support the text. See *Jones v. Peasley*, 3 G. Greene, 52; *Austin v. Burgett*, 10 Iowa, 302; *Woodward v. Adams*, 9 Iowa, 474.

Drake, in his work on Attachment, contents himself with quoting in a foot-note the doctrine of the leading Iowa case without comment. Drake, Attachment. 266. In the treatise of Mr. Wade, in the section previously referred to, the author, in speaking of forthcoming bonds, says: "In some of the states the bonds are conditioned in the alternative, for the delivery of the chattels, or for the payment of their value or the amount of the judgment. But the alternative condition does not discharge the property from the lien." In support of this opinion the author cites two cases: *Gray v. Perkins*, 12 Smedes & M. 622; *Gass v. Williams*, 46 Ind. 253.

The section under consideration by the court in the Mississippi case provided, in substance, that attachments shall hereafter be repleviable, at any time before final judgment, on the appearance of such defendant, and his execution of a bond, with sufficient security, payable to the plaintiff, in a sum double the value of the property attached, and conditioned to have said property forthcoming to abide the order or decree of the court to which said writ of attachment shall be returnable; or, in default thereof, to pay and satisfy, to an extent not exceeding the value of said property, such order or decree of said court. And the court held that by the very terms of the condition, "to have said property forthcoming to abide the order or decree of the court," an intention to preserve the lien was manifest.

So, also, in the case of *Gass v. Williams*, *supra*, under a statute authorizing the property to be released upon the giving of a delivery bond conditioned for its return,

or, in the alternative, for the payment of its value, not exceeding the amount of the judgment and costs, the court held that the giving of a bond did not discharge the lien of the attachment, but that the custody of the defendant was thereby substituted for that of the officer, and that the property was as far from the reach of processes as it would have been in the officer's hands.

Without the alternative provision of the statute, the measure of the liability of the defendant and sureties upon the bond in case the property is not redelivered, as required by the terms of the bond, is the value of the property attached, provided the value does not exceed the amount of the judgment and costs. Wap. Attachm. 396, 397; Drake, Attachm. § 342.

And such is the exact liability fixed by the terms of the act. It will be seen, therefore, that the alternative provision of the statute is but a legislative indorsement of a rule of decision previously announced by the courts. Certainly, therefore, every reason for holding that without this provision the lien is not discharged by the giving of a redelivery bond is an argument in favor of the conclusion that under such a provision the lien remains although the bond be given. The primary condition of the bond in either case is that the defendant will, on demand, redeliver the property; the liability of the sureties for the value attaching only upon his failure so to do.

The purpose of having the property redelivered is that it may be subjected to the payment of the judgment; and we think it would be a fraud upon the sureties to allow it to be subjected to execution issued at the suit of other parties, and thus permit third parties to defeat a compliance with that which we have seen is the primary condition of the bond.

In suits in the justice's court there is no provision of law for prorating the proceeds of the attached property, the creditor first securing a lien upon the property by attachment being entitled to sufficient of the pro-

ceeds thereof to discharge his judgment; and we think the better reason, and perhaps the weight of authority, are in support of the doctrine that the attachment lien is not discharged by giving a redelivery bond, as in this case, conditioned for the return of the property, or, in the alternative, the payment of its value.

Having determined that the lien of the attachment issued at the suit of Whitsett remained in force at the time of the levy of the execution issued in the suit, we are next to consider whether such lien entitles these plaintiffs to maintain the action of replevin against the officer for the possession of the chattels covered by the redelivery bond.

The sureties upon the forthcoming bond do not claim to have any interest in the property other than the right to have it preserved so that it may be delivered upon the bond in case such delivery be required. At the time this case was tried in the court below the suit in which the first forthcoming bond was given was still pending and undetermined. The sureties upon such bond had not, therefore, become liable for one dollar upon their obligation. The defendant may finally obtain judgment in his favor in that suit, or the attachment may be dissolved; and in either event the sureties upon the bond would be discharged from all liability. The defendant alone became entitled to the possession of the property upon the giving of the bond. Such right of possession did not extend to his sureties; and they could not, therefore, maintain this action for a return of the property. Wells, Repl. § 154 *et seq.*; *Gray v. Perkins*, 12 Smedes & M. 622; *Hagan v. Lucas*, *supra*; *Lusk v. Ramsay*, 3 Munf. 417.

Neither is Frank F. Noxon, the defendant in the attachment suits, entitled to recover, under the evidence; it appearing that, when the second attachment writ was levied upon this property, Noxon gave a second forthcoming bond, which he signed with Palmer and another

as sureties thereon, conditioned that in case the plaintiff recover judgment against the defendant in that action, and the attachment be not dissolved, the defendant will deliver to the constable the property, or, on failure, pay its value. Thereafter the attachment was sustained, and judgment entered against the defendant Frank F. Noxon. By the terms of this bond the officer then became entitled to the possession of the property, and it was accordingly surrendered to him by Noxon. Under these circumstances neither the defendant nor the sureties upon this second bond are entitled to the possession of the property as against the officer, although he holds it subject to the lien of the first attachment. *Case v. Steele*, 34 Kan. 90; *Pierce v. Whiting*, 63 Cal. 538; *Dorr v. Clark*, 7 Mich. 310; *Leeper v. Hersman*, 58 Ill. 218; *Lusk v. Ramsay*, *supra*.

No question as to the right of the sureties, whose names appear upon the first bond only, in a proper action to compel the officer to respect the lien of the first attachment, is presented upon this record. We think it clear that the action of replevin cannot be maintained against him, and further than this we do not feel at liberty to decide.

The judgment will be reversed and the cause remanded, with directions to the court below to dismiss the action.

Reversed.

CROSS V. KISTLER.

14	571
21	459

- 1 MORTGAGEE OF CHATTELS FOR ACCOMMODATION BOUND ONLY TO ORDINARY DILIGENCE.—A party accepting a note and chattel mortgage, in his own name, to secure his own claim as well as the individual claim of another, as a matter of accommodation to the latter, and without compensation, is only bound to exercise ordinary diligence, and is not liable for a failure to realize on the securities without proof of negligence.

2. **VERBAL PROMISE TO ANSWER FOR DEBT OF ANOTHER — STATUTE OF FRAUDS.**— A special promise to answer for the debt of another, not in writing, is void under the statute of frauds.
3. **EVIDENCE — WHEN ORAL EVIDENCE OF FACTS PERTAINING TO MATTERS REFERRED TO IN WRITINGS OF THE PARTIES ADMISSIBLE.**— Extrinsic facts and circumstances relating to the parties and their actual dealings with each other in reference to matters referred to in writings may be shown by oral evidence; but mere naked contemporaneous declarations, and the unauthorized statements of third parties, are not admissible.
4. **SAME — ADMISSIBILITY OF LETTERS SIGNED BY THE PARTIES.**— Letters signed by the parties, tending to explain the transaction in litigation, are admissible in evidence.
5. **SAME — INCONSISTENT CONDUCT OF A PARTY ADMISSIBLE.**— The previous conduct of a party, inconsistent with the claim upon which he relied at the trial, is admissible in evidence against him.
6. **PRACTICE WHEN FINDING UNSUPPORTED.**— Where the evidence does not tend to support the finding, the judgment will be reversed as being against the evidence.

Appeal from Arapahoe County Court.

Messrs. COE & FREEMAN, for appellant.

MR. JUSTICE ELLIOTT delivered the opinion of the court.

Jacob Kistler was plaintiff and D. K. Cross was defendant below. The principal facts, as shown by the evidence on the trial, are as follows: In the summer of 1886, one E. J. Leighton was indebted to the plaintiff Kistler in the sum of about \$200, — perhaps a little more, — and also to the defendant Cross in something over \$200. Cross and Kistler, residing in Denver, Colo., made a united effort to secure their respective claims, which resulted in Leighton's executing a note and chattel mortgage payable to Cross for the sum of \$450. The mortgaged property was located in the territory of Wyoming. By agreement between Cross and Kistler, they placed the mortgage securities in the State National Bank of Denver for collection, the proceeds to be credited to their joint account, though their respective claims against Leighton were several, and entirely independent.

Before the mortgage note matured, Cross went east. Before going it was arranged between himself and Kistler that he should endeavor to secure payment of the mortgage note from Leighton, whom he expected to meet in Boston. He met Leighton, who represented that he had no money, and could not pay the mortgage note, but proposed to renew it. He finally gave Cross a power of attorney and bill of sale of everything he had in Wyoming, including the mortgaged property, as further security. The following letters written by Cross, while east, to his nephew in Denver, were read or shown to Kistler as soon as received:

"September 27, 1886. Leighton will make new note and new mortgage, so you need not feel worried about that matter. I shall see that Kistler's interests are secured the same as before. The property will be sold by me, but I am to have plenty of time to dispose of it."

"October 1, 1886. I have just received from Leighton full power of attorney to sell all of his property in Wyoming, signed by himself and Mrs. L. Everything he owns is in my keeping to sell. You can withdraw that note from the bank, and tell Mr. Kistler that I shall do nothing until I see him, and I will protect his interests the same as under the former agreement. I have seen a lawyer, who assures me that our account, and that of Mr. Kistler, is amply secured."

It further appears that only a very small sum was realized from the mortgaged property by Cross, but all that he did receive was placed in the State National Bank, according to agreement. There was some conflict in the evidence on unimportant points, which need not now be noticed. The court found in favor of the plaintiff in the sum of \$200, and rendered judgment therefor against the defendant, who brings the case to this court by appeal. Numerous errors are assigned.

The case was originally brought in a justice's court, so

there are no written pleadings. The principal assignments of error question the sufficiency of the evidence, under the law, to warrant the finding and judgment. It would seem that the trial court must have held that the defendant had in some way become liable to pay Leighton's indebtedness to Kistler, or else that he had been negligent in acting as trustee under the mortgage or power of attorney, whereby Kistler lost the benefit of his security upon the mortgaged property. The finding of the court cannot be maintained on the latter ground, for several reasons: *First*. There was no evidence of the value of the mortgaged property, nor even of its existence, except so far as Cross got returns from the disposition that was made of it. Hence there was no proper measure of damages upon which to base such finding. *Secondly*. Cross was acting as trustee for Kistler, without consideration, and as an act of accommodation merely, and the evidence did not tend to show that Cross could have secured more than he did out of the mortgaged property by the exercise of greater care; and he was only bound to the exercise of ordinary diligence under the circumstances. There was no evidence of negligence on the part of Cross.

The next question to be considered is, did the evidence tend to show a binding promise, contract or undertaking on the part of Cross to pay Leighton's indebtedness to Kistler or to see that the same should be paid? It is to be observed that Cross had nothing whatever to do in procuring the credit to be given by Kistler to Leighton. The indebtedness was the individual and several liability of Leighton. It does not appear that Cross ever heard of it until about the time he and Kistler united their efforts to secure each his own claim. The execution of the first note and mortgage in the name of Cross was not done at his suggestion. They were made out and sent to him in that form by Leighton; and, with the concurrence

of Kistler, he accepted them, and agreed, without compensation, to divide the proceeds so that Kistler should have equal benefit of the security.

There was evidence tending to show that Kistler had begun an attachment suit in Wyoming to secure his debt against Leighton prior to the reception of the first mortgage, and that he was induced by Cross to dismiss this suit and rely upon the note and mortgage. The evidence does not, however, show, nor tend to show, as a consideration for the dismissal of the attachment, that Cross promised to pay Leighton's debt to Kistler or guaranteed that the note and mortgage should prove effective to secure such debt. It does not appear that Cross used anything more than mere persuasion or expression of opinion as to what would be the best course to be pursued for their mutual benefit. There is no pretense that Cross made any misrepresentation or acted in bad faith in the transaction. Cross was the only party who took any particular pains or trouble to secure anything out of the mortgaged property, and what he did get was left with the bank to be divided as agreed. This action is not brought to compel an accounting concerning said proceeds, so the finding cannot be sustained on that ground.

There was considerable conflict in the testimony as to what was said by the nephew of Cross to Kistler when the letters were exhibited; Kistler claiming that the nephew then and there promised unconditionally that Cross would pay Kistler's claim against Leighton, or see that it was paid. The nephew denied this. It is unnecessary to settle this conflict. The testimony was objected to, and was not competent for the purpose for which it was offered. At most it showed only a special promise to answer for the debt of another, not in writing, and hence void under the statute of frauds. The letters showed for themselves what Cross promised; and it does not appear that the nephew was authorized in any way to bind his uncle by any other or different under-

taking. Extrinsic facts and circumstances relating to the parties, and their actual dealings with each other, in reference to the matters referred to in the letters, might be shown by oral evidence, but certainly not the mere naked contemporaneous oral declarations of an unauthorized third party. The first letter showed that Leighton had promised to give a new note and mortgage, but there is no evidence that they were ever given. The second letter showed that Cross had received a full power of attorney to dispose of Leighton's property, and would protect Kistler's interests under the new security *the same as under the former agreement*; but it did not assume to give him any greater protection. The original security was taken in the name of Cross, and immediately deposited in the bank for the mutual protection of himself and Kistler. The new security was also taken in the name of Cross, and the letter was simply an acknowledgment by him that Kistler was entitled to be protected under the new the same as under the original security, and no further. Viewed in the light of extrinsic circumstances, and the dealings of the parties, there was no ambiguity as to the meaning of the letters.

The defendant offered to produce in evidence the letter sent by Cross and Kistler to Leighton, demanding security for their respective claims. The letter, in connection with other testimony, tended to explain how the first note and chattel mortgage came to be executed and sent as they were, and was admissible, though perhaps merely cumulative.

Testimony as to the alleged unconditional promise of Cross to pay Leighton's debt having been admitted, the defendant should have been permitted to show that Kistler was trying to negotiate a settlement with Leighton after the time he claimed Cross had made such unconditional promise; such conduct being inconsistent with the claim that he relied upon the alleged promise.

It is unnecessary to consider further the assignments

of error. Under the law applicable to such cases, we are constrained to say that the finding of the court was against the evidence. Cross and Kistler were undoubtedly both innocent sufferers by the failure of Leighton to pay or adequately secure their respective claims; but, under the evidence, we can see no legal or moral reason why Cross should pay Kistler's claim, in addition to losing his own. The judgment must be reversed and the cause remanded.

Reversed.

14	577
17	128
17	292
17	563
14	577
2a	272

DE VOTIE, BULLOCK ET AL. v. MCGERR.

1. SUPREME COURT COMMISSION — CONSTITUTIONALITY OF ACT PROVIDING — PETITION FOR REHEARING. — The constitutionality of the legislative act providing for a supreme court commission is not necessarily involved upon the petition for a rehearing of a cause which had been referred to the commission in pursuance of said act.
2. DISPOSITION OF COURTS IN REGARD TO DECIDING CONSTITUTIONAL QUESTIONS. — Courts ordinarily decline to determine the constitutionality of legislative enactments in a case where the record presents some other and clear ground upon which the judgment may rest.
3. THE SUPREME COURT NOT AUTHORIZED TO ADOPT, PRO FORMA, THE OPINIONS OF THE SUPREME COURT COMMISSIONERS. — The supreme court alone can promulgate opinions and render judgments, and its duty is not discharged by the adoption *pro forma* of the conclusions of the supreme court commission.
4. RIGHT OF ORAL ARGUMENT IN SUPREME COURT. — The privilege of being heard orally before the supreme court prior to final judgment is a right which, though subject to reasonable regulation, cannot, under our practice, be denied to any party litigant making reasonable application therefor.

On Petition for Rehearing.

THE provisions of the act of the general assembly specially referred to in the opinion are as follows: Act of April 1, 1889: "Sec. 2. Said commissioners shall be

subject to such rules and orders as the supreme court shall from time to time adopt for their government, and for procedure before them. They shall examine and consider together and report upon such cases as shall be referred to them by the court for that purpose, and perform such other services as the court shall require. Their reports shall be in writing and signed by one of their number, and shall show which concur therein, and which, if any, dissents, and a dissenting commissioner may likewise make a report. Every report shall contain a concise, but comprehensive, statement of the facts in the case, the opinion of the commissioner or commissioners submitting the report, and a citation of the authorities relied on in support of the opinion. The court may provide by rule for a hearing of an oral argument by counsel before said commission: *provided*, that no cause shall be referred to said commissioners in which they, or any of them, are or have been interested as counsel or otherwise.

“Sec. 3. Every opinion shall be promptly delivered to the chief justice, who shall lay the same before the court. The court may approve or modify or reject any such opinion. Whenever it shall approve and adopt an opinion as submitted or as modified, the same, as approved and adopted, shall be promulgated as the opinion of the court, and shall be filed and reported, and judgment shall be rendered in the same manner, and with the same effect, and subject to the same orders, motions and petitions for rehearing as in the case of other opinions and judgments of the court; and every such opinion shall show which commissioner prepared the opinion, and which concurred, and the approval and adoption, and by the concurrence of which judges; and, whenever the court shall reject the opinion of the commissioners in any cause, the opinion of the court shall be prepared, and a like proceeding had in all respects as in other causes submitted to the court.”

Messrs. MORRISON & FILLIUS, GEO. H. KOHN and HUGH BUTLER, for appellants.

Messrs. C. C. POST and L. C. ROCKWELL, for appellee.

Opinions were delivered by the members of the court as follows:

MR. JUSTICE ELLIOTT. This cause was brought to this court on appeal from the district court of Clear Creek county, and, being regularly pending here, was, in pursuance of the act of April 1, 1889 (Sess. Laws, 444), referred to the supreme court commissioners to examine and consider. After an oral argument before the commissioners they reported an opinion advising that the judgment of the lower court be affirmed. That opinion was, upon consideration by this court, approved, adopted and promulgated as its opinion, and judgment of affirmance was rendered thereon. In this the provisions of the act mentioned above were regularly pursued. The order of reference was open and known to the parties through their respective counsel. Opportunity was given for a full hearing of the cause before the commission upon the whole record, orally as well as by the printed arguments of counsel on file; but the parties did not have an opportunity to be heard orally before the court, either in person or by counsel, prior to the decision of the case, nor did they have an opportunity to make objections or exceptions to the opinion as reported by the commissioners until after the same was approved and promulgated as the opinion of this court. Among other grounds upon which a rehearing is now asked is the following: "The counsel for appellants desire to argue the validity of an opinion of the supreme court in the form of an indorsement or ratification of the commission based on an oral argument heard before the commission."

By the briefs and arguments of counsel, questions relating to the constitutionality of the act providing for a

supreme court commission are presented for the first time in this court. These questions being of general interest, and of the highest public concern, we have deviated from the usual practice in respect to petitions for rehearing, and, after hearing oral arguments and considering the printed briefs presented upon both sides of the controversy, have concluded to file opinions in writing, so that our views upon the subject may not be misunderstood.

Questions relating to the constitutionality of supreme court commissions have recently been considered by the supreme courts of several states. In Indiana, the question having been presented to the court by a writ of prohibition, Chief Justice Elliott, in an elaborate opinion, concurred in by the whole court, declared the act of the legislature creating such tribunal unconstitutional. In California the proceeding was by *quo warranto*. Learned opinions were delivered by Chief Justice Beatty and by Mr. Justice Fox sustaining the commission. It will be observed, however, that the constitutions, as well as the legislative acts of the two states, differ from each other in some particulars, and also that in both these proceedings the commissioners were made respondents.

In Kansas the question arose as follows: A case pending in the supreme court upon writ of error had been referred to the commissioners, who, after hearing oral argument, prepared an opinion, which, upon due consideration by the court, was promulgated as its opinion. The defeated party sought by motion to obtain a rehearing upon the ground, as alleged, that a hearing had not been had before the supreme court; that the hearing before the commissioners was without force or effect; that the commission was unconstitutional; and that the parties had been deprived of a hearing before a duly constituted and legal court. The Kansas court was divided in opinion upon this motion, though the majority of the court, speaking by Mr. Justice Valentine, in a well-con-

sidered opinion, refused to consider the question of the constitutionality of the act, and, passing upon the merits of the case, denied the rehearing. Chief Justice Horton, however, in a dissenting opinion of rare ability, contended that it was the denial of an "inestimable right" to deprive a suitor of an oral argument before the court prior to rendering final judgment. *State v. Noble* (Ind.), 21 N. E. Rep. 244; *People v. Hayne* (Cal.), 23 Pac. Rep. 1; *Railroad Co. v. Abilene* (Kan.), 21 Pac. Rep. 1112.

Upon careful consideration, we conclude that the constitutionality of the legislative act providing for a supreme court commission is not necessarily drawn in question by the petition for a rehearing, so we shall not express any opinion concerning its validity. Our reasons for this course are well expressed in the language of an eminent author on constitutional questions as follows:

"It must be evident to any one that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously, and with due regard to duty and official oath, decline the responsibility. * * * Neither will a court, as a general rule, pass upon a constitutional question, and decide a statute to be invalid, unless a decision upon that very point becomes necessary to the determination of the cause. 'While courts cannot shun the discussion of constitutional questions when fairly presented, they will not go out of their way to find such topics. They will not seek to draw in such weighty matters collaterally, nor on trivial occasions. It is both more proper and more respectful to a co-ordinate department to discuss constitutional questions only when that is the very *lis mota*. Thus presented and determined, the decision carries a weight with it to which no extrajudicial disquisition is entitled.' In any case, therefore, where a constitu-

tional question is raised, though it may be legitimately presented by the record, yet if the record also presents some other and clear ground upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case, that course will be adopted, and the question of constitutional power will be left for consideration until a case arises which cannot be disposed of without considering it, and when consequently a decision upon such question will be unavoidable." Cooley, Const. Lim. 159, 163.

Though it is deemed inexpedient to determine the constitutionality of the act creating the commission in this proceeding, yet the constitutional duties and obligations of this court to litigants are directly involved; and, in order to pass upon the questions fairly within the purview of a petition for a rehearing, it seems necessary to consider to some extent the nature of the supreme court commission, and the character of its work in connection with the hearing and disposition of causes in this court. The vital question is, Are the rights or privileges of parties in any manner denied or abridged by the reference of their causes to the commission, and the proceedings consequent thereon? The question is one of much difficulty.

Article 3 of our state constitution divides the powers of the government into "three distinct departments," and forbids any encroachment by one department upon another. By the provisions of article 6 of the constitution, we find that "the judicial power of the state" is vested in the courts; that "appellate jurisdiction" is vested in the supreme court; and that "the supreme court shall consist of three judges." While these constitutional provisions remain unchanged, the rights thereby secured cannot be destroyed or impaired by any legislative enactment; neither can the number of judges upon the supreme bench be increased, nor can their essential

powers and responsibilities be shared by others. It is unnecessary to enter into a lengthy discussion of these familiar principles.

The first and second sections of article 2 of the constitution express the fundamental principles of our free institutions, to the effect that the powers of civil government are "vested in and derived from the people" of the state, subject to the constitution of the United States. The people of this state by their constitution have vested in the judicial department of the government all the judicial power they had to give, with a few specified exceptions; and have made the same exclusive, thus making the judiciary co-ordinate with the legislative and executive departments. The supreme court belongs to the judicial department. It derives its existence, organization, powers and jurisdiction from the constitution. The supreme court commission is of legislative creation. The act providing for the commission requires that the commissioners "shall possess the same qualifications" as judges of the supreme court, and that they shall examine, consider and report opinions upon "such cases as shall be referred to them by the court for that purpose;" yet it is clear that they cannot, by mere legislative authority, be invested with those powers which have been committed to another tribunal, under and by virtue of a constitution which declares that the powers properly belonging to one department shall not be exercised by either of the others.

Without undertaking to determine the exact line of demarkation between those governmental powers which are judicial in their nature and those which are not, it is clear that the exercise of judicial power comprehends something more than the use of the perceptive and reflective faculties by which legal conclusions are deduced from the facts of a case. Such acts are intellectual and preliminary. The plenary exercise of judicial power calls into activity also the other attributes of the mind,—

the sensibilities and the will. The deliberate assumption of responsibility; the authoritative expression of legal conclusions in declaring the sentence of the law; the pronouncing of judgment in open court in the presence of those who are to be affected thereby, so as to bind and control persons and property; the protection, and sometimes the loss, of life and liberty, as well as the character and fortunes of individuals; the establishing of precedents which may affect the most cherished rights of persons and property for all time,—all these are often involved in the exercise of judicial power, and serve to illustrate its importance. Such powers cannot be wisely exercised, except by those who personally avail themselves of every opportunity to guide their judgment. They cannot be lawfully exercised, except by those intrusted therewith by the people under the constitution.

While the commissioners, in the performance of their work, are required to consider questions of a judicial nature, and to express their opinions thereon, still their opinions must be considered and approved by the judgment of the court, so as to become essentially the opinions of the court, before they can be considered in any proper sense judicial opinions. The work of the commissioners is in some respects like that of counsel, with this important distinction: that the commissioners are sworn to faithfully and impartially discharge their duties as paid officers of the state, so that, in considering their work, we do not have to make allowance for the bias or prejudice which partisan feeling, self-interest and paid zeal are calculated to inspire. The difference between the argument of counsel and the decision of the court is easily comprehended. The former may be replete with as much or more legal learning than the latter; it may be the result of as much or more exercise of the reasoning faculties; it may show as much or more legal discrimination and sound judgment; it might, if followed, lead to as good or even better results in the administra-

tion of the law in a given case; but the argument of counsel lacks the force and power of the judicial decision, in that it is not pronounced by one clothed with judicial authority under the constitution to give effect to it as a judgment of the court. See opinion of the present chief justice of this court in *Haverly Invincible M. Co. v. Howcutt*, 6 Colo. 574.

It follows, from foregoing views, that every litigant having a cause properly pending in this court is entitled to have the same fully considered and determined by the court itself; that is, by the supreme court, established and vested with judicial power under the constitution. Every such litigant also has the right to have his cause heard by the court itself upon oral or written arguments before final judgment is rendered. It is a matter of common observation that different minds are affected differently by the same arguments, and they sometimes draw different conclusions from the same state of facts. Hence the reference of a cause to the commission may in some instances affect its ultimate determination. The report of the commissioners may bring before the court something which will break the force and effect which the briefs or arguments of counsel might otherwise have produced upon the members of the court who are to decide the cause. Such a result would not be likely to occur in an ordinary case, but, upon evenly balanced or doubtful questions, the strongest minds are more or less influenced by the reasoning of others. Hence, whether a case is referred to the commission or otherwise, it is undoubtedly the duty of the court to consider the whole case before promulgating its final opinion. In case of a reference, the whole record, including the briefs and arguments of counsel, must be considered in order that the opinion reported by the commission may be intelligently "approved, modified or rejected." It is for these reasons that this court has strenuously resisted all opportunities to approve and promulgate the opinions of

the commissioners *pro forma* in the first instance without consideration. The constitutional rights of the parties require that the opinion, by whomsoever prepared, shall be approved and adopted *by the court* before it is promulgated as the opinion *of the court*.

Whether the legislature can control the judicial department, so far as to require that any cause or number of causes pending in this court shall be referred to the commission, thereby imposing upon the court the duty of examining and considering the opinions reported by the commission; also whether the legislature can require opinions reported by the commission to be promulgated in any particular form or manner, in case of their approval and adoption,—are questions which need not now be determined. But, in view of what has been so strongly urged concerning the “indorsement or ratification” of commissioners’ opinions and the importance of “oral arguments,” some expression seems to be called for concerning the views and practice of the court in this regard, for the information of all concerned. It is proper, therefore, to state that this court is now, and always has been, of the opinion that it cannot discharge its constitutional obligations to litigants by the promulgation of any opinion, by whomsoever prepared, without first being satisfied of the correctness of the opinion in all substantial particulars; and also that the privilege of being heard orally before the court prior to final judgment is a right which, though subject to reasonable regulation by the court, cannot justly be denied to any party litigant making seasonable application therefor. “Hear before you strike,” was a maxim of the ancient jurists. Whenever it is necessary that an oral argument should be had in order to a correct understanding and determination of a cause, such necessity is not satisfied by allowing such hearing before the commission; the effect of such oral argument cannot be fully appreciated by the court, except the argument be made to the court.

It would seem to be an improvement in the practice if, when an opinion is reported by the commission, any suitor considering himself prejudiced thereby should have the opportunity of making objections or exceptions thereto, and have the same considered by the court itself before final judgment is rendered. Experienced lawyers, as well as judges, know the superior advantage of being heard before judgment is pronounced rather than afterwards. Ordinarily a motion for a new trial or for a rehearing is not equivalent to a full hearing, before the ideas of the judicial mind upon a given case have become settled by the expression of an opinion in writing. There is something in the act of formulating ideas or mental conclusions into words and sentences that strengthens the conviction of the author as to their correctness. Hence the importance of mature consideration before the entry of judgment, especially in a court of last resort. The fact that this court does not perform the literary labor of expressing the views embodied in the opinions of the commissioners is rather favorable than otherwise to the applicant for a rehearing in such cases. Nevertheless it would seem to be more prudent to give opportunity to litigants to examine and make objections or exceptions to opinions reported by the commission before the court undertakes to consider them, so that they may be passed upon in the light of such objections.

Though the matters considered in this opinion have not been heretofore formally presented or discussed by this court, yet it will be observed from what has already been said that they have not been altogether overlooked. In many cases oral rehearings have been allowed, when applied for, on the ground that arguments made orally before the commission could not be fully appreciated by the court.

It may be said that the act providing for a supreme court commission was designed by the legislature to facilitate the disposition of business in this court, and

that the court should not interfere with such object by assuming the burden of reviewing their work in all cases. The unanswerable reply to this is: Constitutional rights of litigants cannot be sacrificed to expediency. It is true, this court is overburdened with accumulated business. The reasons for this are obvious. Since the adoption of the constitution Colorado has more than quadrupled in wealth and population, and litigation has increased in a still greater ratio. There are now three times as many district and county courts in existence and in active operation as when the state was admitted, and this court may be required to review every one of their judgments by appeal, writ of error, or other remedial writ. Besides, the number of causes of which this court must take original jurisdiction is constantly increasing, and yet the number of judges on this bench remains the same. Hence it should not be a matter of surprise, after the lapse of nearly fourteen years, considering the novel and diversified character of the questions presented to this court for consideration, that the court, desiring to decide every case with due regard to the rights of parties and in strict conformity to legal and constitutional principles, should be somewhat behind upon the calendar.

It is unnecessary, in my opinion, to consider at this time the other grounds upon which the rehearing is asked. In order that appellants may have an opportunity to be heard orally by this court upon the merits of their cause, the petition for a rehearing will be allowed.

Rehearing allowed.

MR. JUSTICE HAYT. No question as to the constitutionality of the act providing for the supreme court commission is either necessarily or properly involved in this determination, and I shall not, therefore, follow counsel in their able and exhaustive argument in this field.

In addition to the reasons given for this conclusion by

Mr. Justice ELLIOTT, in the opinion filed herewith, the fact that the honorable commissioners are not parties to this action should have great weight in support thereof. The commission, as an institution, has now been in existence in this state for upwards of three years, and the public at large may well be supposed to have an interest in the determination of the constitutional question, compared with which this litigation over a few cows sinks into insignificance; and this method of collateral attack ought not now to be encouraged.

In my judgment, the only question in relation to the supreme court commissioners properly before the court upon this motion may be stated as follows: Under the provision of the act of April 19, 1890, in reference to oral arguments, is the duty of this court discharged in cases referred to the commission by providing for an oral argument before that body, or is the party in such cases entitled to an oral argument before the supreme court, before its judgment shall be pronounced? The present act, "providing for a supreme court commission," was passed at the last session of the legislature, and was approved upon the 1st day of April, 1890. A few days later, and at the same session, an act was passed entitled "An act to regulate the terms of the supreme court and the practice therein," which reads as follows:

"Section 1. That in each year there shall be three terms of the supreme court; one beginning on the second Monday in September, another beginning on the second Monday in January, and another beginning on the second Monday in April."

"Sec. 2. The court shall be in open session as often as practicable during each of its terms, to hear and determine matters and causes which may come before it, and oral arguments shall be allowed on final hearing in any cause on the request of any party thereto."

In section 2 of this latter act the right of a party litigant to be heard orally before this court upon request,

before final judgment, is expressly declared. If anything can be found in the statutes which would authorize a refusal by this tribunal to hear a party orally as above, it must grow out of the power given the court to provide by rule for oral arguments before the commission in certain cases. The two acts must be considered together, and effect given to both, if possible. Such effect can best be given by holding that the legislature, in employing the language used in the latter act, intended to put beyond a dispute the right of a litigant to have his case orally argued before this court upon final hearing. It was then legislating with reference to the body designated by the constitution as the supreme court. And the above conclusion is in accordance with the natural and obvious import of the language employed. It cannot be said that, by referring causes to the commission, parties can be deprived of the right to a final hearing before the court. As conclusively shown in Mr. Justice ELLIOTT's opinion, the court alone can render judgment, and its duty is not discharged by the adoption *pro forma* of the conclusions of the commission. And to deprive a party litigant of his right to an oral argument before this court upon such final rehearing, no matter what opportunities may have been accorded him in presenting his case to the commission, would be a palpable violation, not only of the terms of the act itself, but would be contrary to the uniform practice of this court as promulgated by rule 27, provided he has seasonably applied for such oral argument.

In the opinion of the commission in this case, the correctness of the propositions of law announced in certain instructions prayed by appellant, and refused by the trial court, is conceded; the refusal to give such instructions being justified only upon the ground that they were not warranted by the evidence. The correctness of this conclusion is contested by counsel. The point seems to be in much doubt, and, in my opinion, the court ought not

to refuse any assistance to its correct determination which counsel are willing to give. A stipulation by counsel for an oral argument having been filed more than one year ago, and before the reference, I am of the opinion that a rehearing should be granted, to the end that such oral argument may be made to this court as requested by appellants.

CHIEF JUSTICE HELM. The members of the court are agreed upon two propositions: *First*, that the legal existence of the supreme court commission should not be determined upon the present collateral challenge; *second*, that the rehearing in the case at bar should be allowed upon grounds appearing in the record, and wholly independent of the foregoing or any other constitutional question.

In my judgment, the above announcement is all that should be made at the present time. Having squarely declined to consider the constitutionality of the commission statute, it would seem inconsistent to promulgate an opinion discussing matters pertaining solely thereto. Therefore I must be excused from even tacitly sanctioning such a proceeding, as well as from giving a silent indorsement to irrelevant propositions, the logical sequences from which do not meet my approval. It seems to me, also, that explanations concerning the manner in which this court discharges its constitutional duties would be more appropriate upon some other occasion.

Nor am I now prepared to favor the position taken by one of my associates regarding oral arguments. The conclusion reached is necessarily predicated upon the legislative right to prescribe a court regulation in the premises. The statute relied on is but a repetition of the standing rule of this court in force several years prior to its enactment. This rule the court has always regarded as obligatory, and never, to my knowledge, has an oral argument upon final hearing of a cause been re-

fused, when proper application was made therefor. Hence I must not be understood as in any way questioning the utility or propriety of the practice. On the contrary, I am, and have always been, an earnest advocate thereof. If an oral argument is the litigant's constitutional right,—a matter upon which I express no opinion,—the statute does not magnify or strengthen such right. If, on the other hand, this be but one of the privileges usually extended in the trial of causes, a statute commanding its allowance by the court may be an unwarranted departure from the field of proper legislation. If the legislature can command the court to hear oral arguments, it would seem to follow that, if the right be not constitutional, it might *forbid* the hearing thereof; and, if this be conceded, I do not see why that body may not fix the time to be consumed by counsel, command or forbid printed arguments, arrange the order of business, and make any and all other rules or regulations regarding judicial proceedings. Undoubtedly, legislation may and must cover a wide range of subjects, connected directly or indirectly with judicial action; but that a limit exists somewhere to legislative power over the manner in which courts created by the constitution shall perform judicial duties and conduct judicial business will hardly be questioned. The supreme court of California has held that the legislature cannot require its opinions to be reduced to writing. *Houston v. Williams*, 13 Cal. 24. Doubtless many other illustrations might be found of instances where legislative authority in the premises has been denied. But I have said sufficient to explain my reluctance in approving the major premise, upon which the opinion in question necessarily rests.

My associates have seen fit to adopt, as a standing rule of court, a regulation in pursuance of which opinions of the commission are deposited with the clerk, and treated to all intents and purposes as reports of referees in ordinary judicial proceedings. The adoption of this

rule is, to some extent, an outgrowth of the present controversy. It must have been based either upon grounds of expediency or of legal necessity. The efficiency of the plan, whether resting upon one ground or the other, I am led, upon reflection, to seriously doubt. I do not consider whether the rule is consistent with the statute creating a supreme court commission. My misgivings are predicated upon the fear that it will not simplify the disposition of cases, or remove the embarrassment that has heretofore necessarily attended the joint labors of the court and commission. In my judgment, moreover, it is doubtful if any of the alleged constitutional exceptions urged against the organization and work of the commission are thus obviated. But I shall for the present refrain from entering into a discussion of specific objections. The rehearing is allowed.

Rehearing allowed.

14	593
17	75
14	593
21	74

PLEYTE V. PLEYTE.

PRACTICE IN SUPREME COURT ON APPLICATION TO CORRECT THE RECORD BELOW.—An application to correct the record in a cause pending before the supreme court does not lay the foundation for a new proceeding on error. When leave is given to apply in the court below for such correction, and the application is granted or refused, the proceedings thereon should be reported as an amendment to the transcript in the original cause.

Error to District Court of Arapahoe County.

MOTION to dismiss writ of error.

MESSRS. SULLIVAN & MAY, for plaintiff in error.

MESSRS. PATTERSON & THOMAS, for defendant in error.

VOL. XIV—38

CHIEF JUSTICE HELM delivered the opinion of the court.

Dirk Pleyte obtained a decree of divorce in the superior court of Denver from Elizabeth Pleyte, his wife. To review that decree, Mrs. Pleyte subsequently sued out of this court a writ of error, and the cause was here docketed as No. 2,494. Counsel for plaintiff in error afterwards discovered what they claim to be a clerical mistake in recording certain action in the court below. Upon application, this court suspended further proceedings in that cause, so that counsel might have the alleged mistake corrected by the trial court. In the meantime the superior court had been discontinued, its records being transferred to the custody of the district court of Arapahoe county under a legislative mandate. To the latter court application was made, upon due notice, by petition and affidavits, for the correction in question. While finding at the hearing that the facts were as claimed by petitioner, and that the petition was presented at once upon discovery of the mistake, the district court nevertheless decided that, as a matter of law, it could not amend the record, and entered judgment denying the application.

Plaintiff in error thereupon took her exception to the ruling in question, sued out the present writ of error, and docketed the cause as a separate and distinct suit in this court. The motion before us is to dismiss this writ of error.

The proceeding in the court below was not an independent suit. It was purely auxiliary to the original divorce proceeding to be reviewed by this court in cause No. 2,494. The object was not to vindicate an independent right of action, or obtain a separate judgment. It was to secure the correction by the court below of an alleged mistake or misprision of its clerk in making a certain record entry, which correction was deemed essential to a proper review of the matters before us in the

case referred to. The result of these supplemental proceedings should have been reported as an amendment to the transcript filed in the former cause. They should not have been brought here as a foundation for a separate suit upon error. Such is the established practice of this court in similar cases. *Wolsley v. Mining Co.* 3 Colo. 296; *Knox v. McFerran*, 4 Colo. 348.

By the statute of 1889 (sec. 5, p. 73, and sec. 1, p. 78), rulings subsequent to final judgment are expressly made reviewable; but we do not construe these provisions as abrogating the former practice of the court, and authorizing a new and independent writ of error in cases like the one at bar. When the court below, as in the present instance, declines to make the correction demanded, counsel, of course, does not tender his supplemental transcript for the purpose of having it govern the final hearing. He presents in this way, for consideration under the statute of 1889, the alleged errors committed in refusing his application to correct the record. It may be necessary to dispose of the new matters thus brought before the court prior to a final hearing of the cause. If so, the parties can be heard in pursuance of appropriate special orders adopted for the purpose.

The present writ of error must be dismissed, but counsel may withdraw the record, and, upon notice, tender it for leave to refile as a supplemental transcript in No. 2,494.

The foregoing conclusion is decisive of the motion before us, and we deem it improper to consider at this time the conflicting views of counsel upon the correctness of the ruling in question by the court below. It will be time enough to examine these matters when the supplemental transcript is filed, if counsel shall determine to present the same in accordance with the foregoing suggestion. The motion is sustained and the writ of error is accordingly dismissed.

Writ of error dismissed.

FINDING V. HARTMAN ET AL.

1. **CONTRACT FOR A SALE OF CHATTELS TO BE SUBSEQUENTLY DELIVERED NOT A FRAUDULENT CONVEYANCE.**— A contract under which a firm of merchants are to furnish supplies and money to the owners of a mine, and in return are to receive ore as mined, is not a present absolute sale of the ore, though it contains the words "sells, assigns and transfers;" and it is therefore not within the provision of the General Statutes of Colorado, chapter 43, section 14, declaring that every sale of chattels, unless accompanied by an immediate delivery and a continued change of possession, shall be conclusively presumed fraudulent as against creditors of the vendor.
2. **TITLE TO THE CHATTEL VESTS UNDER THE CONTRACT ON DELIVERY.**— Under such a contract title to the ore vests in the merchants on its delivery, and a creditor of the mine-owners who thereafter attaches it takes nothing by his levy.
3. **THE CONTRACT IS NOT ASSAILABLE FOR IRREGULARITY AFTER DELIVERY.**— The contract having been carried out by the mine-owners jointly, and title to the ore having vested in the merchants on its delivery, the attaching creditor cannot assail the contract because it was executed in the name of only one of the mine-owners.

Appeal from District Court of Summit County.

DOLMAN, STALEY & BLACKMAN, as lessees, were engaged in extracting and shipping ore from the Cincinnati mine, near Breckenridge. For the purpose of obtaining provisions and materials from time to time as needed to carry on said business, Dolman, in their behalf, entered into a written contract with J. H. Hartman, acting for the firm of J. H. Hartman & Bro., merchants in the town of Breckenridge. The terms of this contract sufficiently appear in the opinion.

Dolman *et al.* became indebted to Hartman & Bro. in the sum of \$441, and in pursuance of said contract they undertook to deliver to Hartman & Bro. thirteen thousand five hundred and eighteen pounds of selected ore. This ore was brought to the town of Breckenridge and loaded into a railroad car. Thereafter, and before the

car was sealed, the deputy sheriff notified the station agent that he attached it, but made no effort to take possession. On the same day the car was duly sealed ready for shipment, in the name of J. H. Hartman & Bro., to whom the bill of lading was made out. At a later hour the sheriff and deputy returned, broke open the car, levied upon the ore under the writ of attachment, took possession, and removed it to the ground. Prior to this levy Hartman notified the officer that the ore belonged to J. H. Hartman & Bro.

The attachment proceeding mentioned was instituted by appellant Finding for a sum due him from Dolman and one Hudson, who had previously acted as copartners, under the firm name of Hudson and Dolman. Plaintiff obtained judgment for the amount of his claim, and the *regularity of the issue* of his attachment writ was sustained. Hartman & Bro., however, intervened under the statute, and upon the plea of intervention the principal trial took place. The intervenors recovered a judgment for the redelivery of the ore, together with \$50 damages. From that judgment the present appeal was taken.

Between the dates of levy and trial in the district court the ore lay on the ground, exposed to the weather, driven over and somewhat scattered by wagons, for a period of six months. The two grades into which it had previously been divided were by the sheriff, in unloading, indiscriminately mingled. Testimony was offered by plaintiff showing the injury thus occasioned. Proof was also admitted to the effect that Hartman & Bro. paid \$75 attorney's fees at the first trial, which took place in the county court.

Mr. M. B. CARPENTER, for appellant.

Messrs. MONTGOMERY & FROST, for appellees.

CHIEF JUSTICE HELM delivered the opinion of the court.

Finding was not a creditor of Dolman, Staley & Blackman, nor was he a creditor of Dolman alone. His claim was against Hudson & Dolman, a partnership that had previously ceased to exist. It is extremely doubtful, therefore, if he could in any event maintain his attachment upon the ore in question. Certain it is that he was not entitled to hold the interest therein of Staley and Blackman. The mere fact that their names do not appear in the so-called "bill of sale" to Hartman & Bro. does not conclude their rights in the premises. But we prefer to rest the present decision upon other grounds.

The jury must, under the instructions, have found that the ore in question was delivered to Hartman & Bro. before the levy of the attachment, and there is no doubt but the evidence amply sustains this finding. The attempt of the deputy sheriff to levy his writ in the morning was ineffectual because he took no possession.

It is insisted, however, as a matter of law, that, under section 14 of the statute of frauds, the failure to make an immediate delivery of the ore, upon execution of the alleged bill of sale or assignment, rendered the entire transaction void as to creditors of the vendor. If this position be correct, it is decisive; for, as a matter of fact, twenty-six days intervened between the execution of the instrument and delivery of ore thereunder. Assuming, for present purposes, that Finding was a creditor of Dolman, Staley & Blackman, we shall proceed to consider this objection.

At the common law, and under statutes in affirmance of the common law, the absolute sale of personal property, unaccompanied by immediate delivery and continued change of possession, was regarded as fraudulent. But as to whether such transactions should be treated as frauds *per se* and void, or simply as indications of fraud

in fact subject to contradiction by proof of good faith, and hence merely voidable, there was great contrariety of judicial opinion. In some instances the same tribunal has at different periods favored both doctrines; this is true of the supreme court of the United States. See *Hamilton v. Russell*, 1 Cranch, 310; *Warner v. Norton*, 20 How. 448. To put the matter entirely at rest, the specific provision under consideration was wisely enacted. Its conclusiveness in fixing upon such transactions the character of fraud in law, incapable of explanation, has been frequently recognized by this court. *Cook v. Mann*, 6 Colo. 21; *Wilcox v. Jackson*, 7 Colo. 521; *Ray v. Raymond*, 8 Colo. 467; *Bassinger v. Spangler*, 9 Colo. 175; *Sweeney v. Coe*, 12 Colo. 485.

The statute in question reads: "Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold or assigned, shall be presumed to be fraudulent and void, as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith, and this presumption shall be conclusive." Gen. St. ch. 43, § 14.

Obviously, this provision deals with sales or assignments of personal property capable of immediate delivery, when the present transfer of title is affirmed. It was intended to prevent fraud upon creditors and purchasers through retention of possession and continued apparent ownership after an asserted sale or assignment, complete in all other respects. The object of its framers was, so far as possible, to remove temptation for the commission of fraud in transferring the ownership of chattels.

The alleged bill of sale or assignment upon which reli-

ance is placed in the case at bar does not belong to such a transaction. It is inartificially drawn, and the words, "sells, assigns, and transfers," are employed; but several elements usually characterizing an actual sale are absent. No present payment, either in money or goods, is recited, nor is a present delivery of ore pretended. No definite quantity of ore is mentioned, and no purchase price is specified. The ore itself had not been mined, and could hardly be said to have had more than a potential existence. It was not only incapable of immediate delivery, but, owing to the uncertainties of mining, serious doubt existed if delivery would ever be possible. Hartman & Bro. were only to receive enough of the ore as extracted to satisfy the amounts due from time to time, upon orders previously paid, either in goods or money. This might require the total output, or it might take but a small fraction thereof. If, perchance, more than a sufficient quantity of ore for this purpose were delivered, they would doubtless have to account to Dolman & Co. for the surplus of proceeds.

The idea of security is conspicuous in the writing, and the agreement is executory, having reference entirely to future transactions. It is intended to secure future advantages to one party, and give protection in connection therewith to the other. Hartman & Bro. are to furnish supplies and money, and in return are to receive ore as mined. This agreement is binding between the parties, but it does not constitute a present absolute sale as to creditors. Hartman & Bro. have a right to require compliance so long as it is within the power of Dolman & Co. to render the same. But, if a creditor attaches before delivery under the contract, such creditor takes precedence in payment, and a title acquired through his levy would undoubtedly be good. Thus it appears that not only is the transaction in its nature intrinsically without the letter of the statute now under consideration, but

also without its spirit; for creditors are not thereby deceived or prejudiced.

Under this contract, title to the ore on one hand, or to the goods or money on the other, does not pass until actual delivery thereof. But, since such actual delivery to Hartman & Bro. of the ore in controversy took place prior to the levy of the attachment writ, we are of the opinion that the title passed, and appellant took nothing through his subsequent levy.

We have avoided the discussion, because it would be improper, of the question elucidated in the California decisions referred to, viz.: Whether or not, when the chattel sold, being capable of immediate delivery, is retained by the vendor for a considerable period, but nevertheless is delivered to the vendee before levy of a creditor's writ, the sale is by the retention rendered void as to such creditor.

It appears from the evidence that, though the written contract was executed in the name of Dolman alone, it was in fact entered into on behalf of the partnership of Dolman, Staley & Blackman; also that it was carried out by this partnership. But if counsel's contention were true that, notwithstanding these facts, it could not be regarded in the present action as a partnership contract, appellant receives no benefit therefrom. The transfer to Hartman & Bro. being *bona fide*, and the title having passed by actual delivery before appellant's levy, it is obviously a matter of indifference to him who the real vendors were. Nor can we agree with counsel that the slight variance relating to the firm name of the intervenors, pointed out between the plea of intervention and proofs, could in any way affect a substantial right of appellant. This objection must therefore be disregarded.

It is clear from the evidence that the jury awarded the \$50 for injuries to the ore, occasioned by its exposed and

unprotected condition while in the sheriff's hands. It could not have been given as reimbursement of the attorney's fee for the trial in the county court. If, therefore, there was any error in receiving evidence relating to this fee, or in submitting that matter to the jury, it was error without prejudice. The judgment of the district court is affirmed.

Affirmed.

INDEX.

ABANDONMENT:

EQUITIES MAY BE FORFEITED BY LACHES OR ABANDONMENT.— Courts of equity will only grant relief where the application therefor is made without unreasonable delay. The strongest equities may be forfeited by laches, or abandoned by acquiescence. *Great West. M. Co. v. W. of A. M. Co.* 90.

ABUTTING OWNER:

HIGHWAYS — ABUTTING OWNERS.— Where a land-owner has no fee in the land occupied as a highway, but his land abuts on it, and he has rights therein not shared in common with the general public for purposes of travel and use, a person using or appropriating such highway or a portion of it for other and different purposes than the one contemplated, whereby the highway is obstructed and impaired as a means of ingress and egress, is liable to the abutting owner for any consequential damages arising from such appropriation and use depreciating the value of the property. *Town of Longmont v. Parker*, 386.

ACCORD AND SATISFACTION:

ACTION FOR DAMAGES FOR CAUSING DEATH OF HUSBAND BROUGHT AFTER SATISFACTION OF ALL DEMANDS.— A widow brought suit to recover of the defendant damages for causing the death of her husband after a settlement with the defendant in relation to business transactions relating to the estate of the deceased, in which the plaintiff and defendant signed a paper reciting the transactions had between them, and stating that these are "in full demands of every name and nature whatsoever from one party to the other." This paper being produced in evidence under a plea of accord and satisfaction authorized the court to direct a verdict for the defendant. *Guldager v. Rockwell*, 459.

ACKNOWLEDGMENT:

An unacknowledged deed may be effectual in passing title to realty. *Armor v. Spalding*, 802.

ADMINISTRATION OF ESTATES: See EXECUTORS AND ADMINISTRATORS.

ADVERSE CLAIMS:

1. **CONSTRUCTION OF THE PHRASE, "CLAIM AND COLOR OF TITLE MADE IN GOOD FAITH."**— Under the statute requiring "a claim and color of title made in good faith" as a ground of adverse possession, one cannot hold adversely to another when he knows that his entry in the land-office has been set aside or disregarded, and a patent has issued to the person against whom he claimed an adverse holding. *Arnold v. Woodward*, 164.

2. **AN ADVERSE CLAIM MUST BE FILED WITHIN THE SIXTY DAYS OF PUBLICATION.**— An application for patent to a mining location being filed in a United States land-office, and notice published as

ADVERSE CLAIMS — Continued.

required by law, unless an adverse claim be filed in the land-office within the sixty days of publication, no action is maintainable under section 2326, Revised Statutes of the United States, or under section 257 of the Civil Code. *Hunt v. Min. Co.* 451.

AFFIDAVIT:

OFFICE OF AN AFFIDAVIT IN CONTEMPT PROCEEDINGS.— When it is manifest from the course of the proceeding that the language of a petition for a change of venue on the ground of the alleged prejudice of the presiding judge is not a contempt *per se*, but only a constructive contempt, if any, the court is without jurisdiction to order a warrant of attachment to issue against the offender unless an affidavit be presented containing a statement of the facts constituting the contempt. The unsworn report of a committee appointed by the court to inquire into the matters alleged, itself unsworn, does not perform the office of an affidavit. *Thomas v. The People*, 254.

AGENT: See **PRINCIPAL AND AGENT; INSURANCE.**

AGREEMENT: See **CONTRACTS.**

AMENDMENT:

1. **CORRECTING OFFICER'S RETURN AS TO DESCRIPTION OF ATTACHED PROPERTY.**— Amendments to the officer's return upon process to correspond with the fact, unless the party complaining has been deceived or misled to his prejudice, are liberally allowed. And when it appears that the notice of attachment upon realty, filed with the clerk and recorder, is correct, it is not error, on application supported by affidavits and notice to opposing counsel, to allow the sheriff to amend his return by correcting a misdescription of the realty attached. *McClure v. Smith*, 297.

2. **PRACTICE ON APPLICATION FOR CORRECTION OF RECORD.**— An application to correct the record in a cause pending in the supreme court does not lay a foundation for a new proceeding on error. When leave is given to apply in the court below for such correction and the court below grants or refuses the application, the proceedings should be reported as an amendment to the transcript in the original cause. *Pleyte v. Pleyte*, 593.

3. **REFORMING INSTRUMENTS IN WRITING RELATING TO REAL ESTATE.**— Instruments in writing relating to real estate, which through mistake or fraud fail to express the intention of the parties thereto, may be reformed, as between the makers, and subsequent purchasers with notice of the error, so as to express the intention of the parties. *Smith v. Brunk*, 75.

APPEAL (see, also, PRACTICE IN THE SUPREME COURT):

1. **JUDGMENT OF POLICE MAGISTRATE APPEALABLE.**— Under the charter of the city of Central an appeal lies from a judgment of the police magistrate to the district court, but it is to be granted in the same manner and prosecuted with the same effect as appeals under the present laws from justices of the peace to the county court are granted and prosecuted. *Huer v. City of Central*, 71.

2. **ERROR TO DISMISS THE "CAUSE" WHEN PENDING ON APPEAL.**— On such an appeal, irrespective of the question of jurisdiction, the district court was not authorized to dismiss the "cause." *Ib.*

3. **REFUSAL OF RECEIVER TO EXECUTE A DECREE APPEALED FROM.**— The taking and perfecting of an appeal under the act of 1885 (since repealed) by the filing of the bond required by sec-

APPEAL — Continued.

tion 23, page 354, from a decree dissolving a temporary injunction, and ordering the receiver to deliver over possession of the property involved to the persons entitled thereto under the decree, operated as a *supersedeas* and stay of process and proceedings as to every part of the decree. The trial court being thus ousted of all power to enforce it, the receiver was not in contempt for declining to execute it pending the appeal. *Hurd v. People*, 207.

4. **APPEALS IN FORCIBLE ENTRY AND DETAINER CASES.**— Appeals to the supreme court in forcible entry and detainer cases are allowable only where the judgment appealed from amounts, exclusive of costs, to \$100, or relates to a franchise or freehold. *Crane v. Farmer*, 294.

5. **JOINING IN ERROR WILL NOT CONFER JURISDICTION.**— Where the judgment sought to be appealed from is not appealable, consent by joining in error is ineffectual to save the appeal. *Ib.*

6. **TAKING AN APPEAL FROM THE COUNTY TO THE DISTRICT COURT.** An appeal is not taken from the county to the district court by reason of the fact that it is "prayed and allowed." The appeal bond must be filed and approved before the appeal can be considered "taken,"—that is, perfected; and, if this be not done on the day on which judgment is rendered, the notice in writing must be served or the appeal may be dismissed. *Law v. Nelson*, 409.

7. **A MOTION TO DISMISS AN APPEAL IS NOT A GENERAL APPEARANCE.**—A motion confined to the single object of enforcing a statutory right, though not special in form, cannot be considered a waiver of such right, as by a general appearance for other purposes. *Ib.*

8. **PRACTICE IN SUPREME COURT — A JOINT APPEAL NOT MAINTAINABLE UNLESS EACH APPELLANT ENTITLED TO AN APPEAL.**— Under the act of 1889, page 77, providing for appeals from courts of record to the supreme court, a joint appeal will not lie in any case unless as to each appellant there exists a final judgment or decree amounting to the sum of \$100, exclusive of costs, or relating to a franchise or freehold. When, therefore, the only judgment rendered against a portion of the defendants is a judgment for costs, a joint appeal will be dismissed on motion of the appellee. *Diamond Tunnel, etc. Co. v. Faulkner*, 438.

9. **DISMISSAL OF APPEALS — IF THE MOTION THEREFOR CONTAIN SUFFICIENT GROUNDS, THAT IT ALSO RECITE INSUFFICIENT GROUNDS CONSTITUTES NO WAIVER OF APPELLEE'S RIGHTS.**—The appellee does not waive his right to have the appeal dismissed by asserting in his motion as an additional reason therefor that the purported transcript is scandalous and irregular, and cannot be treated as a transcript under the rules of the court. *Ib.*

10. **APPEAL — FAILURE OF APPELLANT TO SERVE NOTICE WAIVED BY GENERAL APPEARANCE OF APPELLEE.**—In case of an appeal from the county court to the district court under the act of 1885 (Sess. Laws, 1885, p. 159) by a defendant some days subsequent to entry of judgment against him, his failure to serve notice of the appeal upon the plaintiff within five days after taking the same is waived and cured by a full appearance in the district court by the appellee and his participation in the action of the court in setting the cause down for trial *de novo*. Such action is a waiver of appellee's privilege to have the appeal dismissed or the judgment affirmed for failure to serve the required notice. *Robertson v. O'Reilly*, 441.

11. **WHEN APPEAL DEEMED "TAKEN."**—An appeal is taken, within the meaning of section 4 of the act of 1885, relating to appeals from county to district courts, when the appeal bond is filed and approved. *Straat v. Blanchard*, 445.

APPEAL—*Continued.*

12. FAILURE TO SERVE NOTICE OF APPEAL IN TIME PRESCRIBED NOT CURED BY SUBSEQUENT NOTICE.—If appellee gives written notice to appellant that he will apply for dismissal of the appeal, or affirmance of the judgment, under said act, and follows it up with diligence, a subsequent notice by appellant that the appeal has been taken will not be allowed to defeat the statutory rights of appellee. *Ib.*

13. LIABILITY OF SURETIES ON APPEAL BOND.—Unless plaintiff in error procures his *supersedeas* within thirty days after the date of dismissal of his appeal, the sureties upon his appeal undertaking become liable thereon as in case of affirmance. *McMichael v. Groves*, 540.

APPEAL BONDS: See BONDS.

ASSIGNMENT:

1. FRAUDULENT ASSIGNMENT OF PROMISSORY NOTE.—The assignee of a promissory note who pays no consideration therefor and participates in the fraudulent intent of his assignor is not entitled to the immunity of *bona fide* assignees for value, before due, of commercial paper. *Hamill v. First Nat. Bank*, 1.

2. ACTION BY ASSIGNEE OF CHOSE IN ACTION—NOTICE TO DEBTOR, WHEN NOT NECESSARY TO COMPLETE ASSIGNMENT.—Notice to the debtor by the assignee of a chose in action is not necessary to complete the assignment, where there is no controversy between different assignees or attaching creditors of the fund assigned. *Jackson v. Hamm*, 53.

3. RIGHT OF ASSIGNEE TO MAINTAIN SUIT IN HIS OWN NAME—RECORD MAY BE AMENDED WHEN ACTION BECOMES FOR USE OF ANOTHER PARTY.—The assignee of a claim against the receiver of a railway company, having obtained permission from the proper court, may, under the code, bring suit in his own name, and, though the assignment be indorsed to another, he may still maintain the action in his own name so long as he retains possession of the instrument of assignment, and may cause the record to be amended by adding the name of the indorsee as the use party, who will thereafter be entitled to control the proceedings, and will be bound by the judgment. *Ib.*

4. PROMISSORY NOTES—LEGAL EFFECT OF THEIR ASSIGNMENT.—The assignment of a promissory note vests in the assignee both the note and the security originally given in connection therewith. *Smith v. Brunk*, 75.

5. DEFENSE THAT THE DEBTOR IS OWNER OF HIS OWN CONTRACT OBLIGATIONS.—The purchase by a debtor of his own contract obligations from one to whom they have been assigned by his creditor as collateral security does not invest such debtor with the ownership of the obligations. The payment by him of the debt for which they are held as collateral merely entitles him to offset the amount paid in an action brought against him on the obligations by his creditor. *Moffatt v. Corning*, 104.

6. ASSIGNMENT OF CONTRACTS—A STIPULATION AGAINST THE ASSIGNMENT OF A CONTRACT NOT VIOLATED BY ITS ASSIGNMENT AS COLLATERAL SECURITY.—A provision in a contract for the sale of land that it should not be "assignable or negotiable," and that the purchase money should be payable to the vendor, and "only to him, and none other," is not violated by the vendor assigning the contract as collateral security, as the only effect of such provision was to prevent the title to the chose in action from passing to another so as to preclude defendants from asserting any equity or

ASSIGNMENT—Continued.

defense that might arise between the original parties. *Butler v. Rockwell et al.* 125.

7. **ASSIGNMENT OF CLAIM AGAINST A COUNTY—GARNISHMENT.**—Where an individual who is working for a county, under a contract, gives to the county clerk thereof an order to deliver all warrants issued by the county commissioners to him to one J., as collateral security for a note attached to the order, the acceptance of such order by the written indorsement thereon of the county clerk perfects the assignment, and places the assignor's claim against the county beyond the reach of garnishment. *Lewis v. Commissioners*, 371.

8. **TRANSFER OF STOCK OF A CORPORATION.**—Under the laws of this state title to stock in a corporation, as against creditors, can only pass by transfer on the books of the company. *Conway v. John*, 30.

ATTACHMENT:

1. **SERVICE OF NOTICE ON NON-RESIDENTS.**—Under the act of 1879 in relation to attachments before justices of the peace, requiring notices in certain instances to be posted in three of the most public places in the precinct, evidence showing that one of such notices was posted on the front door of the court-house, one on the side of the stairs leading to the justice's office and one on a certain corral fence, and that "these places were then regarded, and would now be, three about as public places as could be found in the precinct," shows a sufficient compliance with the statute as against a collateral attack upon the proceedings. *Conway v. John*, 30.

2. **TRANSFER OF STOCK IN TRADE BY INSOLVENT FIRM—RATIFICATION BY CREDITORS.**—Where an insolvent firm has transferred all its property, taking notes in payment, its creditors, who have not sought to have the sale set aside, but have acquiesced in it, and treated it as legitimate, by proceeding against the purchasers by attachment for the money supposed to be due on the notes, cannot question the *bona fides* of the sale. *Sickman v. Abernathy*, 174.

3. **VALIDITY OF PAYMENTS MADE BY PURCHASERS OF STOCK CANNOT BE QUESTIONED COLLATERALLY.**—Nor can they in such proceeding attack the validity of payments made by the purchasers, though the latter had knowledge of the firm's indebtedness, since there is no privity between them and the purchasers. *Ib.*

4. **RIGHT OF PARTNERSHIP FIRM TO CONTRACT AS TO MANNER OF PAYMENT OF NOTES TO BECOME DUE IT ON SALE OF ITS EFFECTS.**—In such proceeding, evidence as to contracts between the firm and the purchasers, as to the application on notes of accounts due the firm by the partners individually, and assigned to the purchasers with the other firm accounts, is immaterial, since the parties had a right to make any contract they chose as to the mode of paying the notes. *Ib.*

5. **BONA FIDE PURCHASERS NOT LIABLE TO GARNISHMENT AFTER PAYMENT OF PURCHASE MONEY.**—The right of a creditor to garnish property, effects, etc., of a debtor, in the possession and charge, or under the control, of a third person, under General Statutes, section 1554, does not apply as against purchasers, without fraud, of the property of an insolvent partnership, who have paid the purchase money. *Ib.*

6. **CONSTRUCTION OF STATUTES AND OF CONTRACTS—APPLICATION THERETO OF THE PRINCIPLE OF NOSCITUR A SOCIIS.**—The code provision that "in all actions brought upon overdue promissory notes, bills of exchange, other instruments for the direct payment

ATTACHMENT—Continued.

of money, and upon book-accounts, the creditor may have a writ of attachment issue upon complying with the provisions of this section," in so far as it relates to written contracts is to be limited to contracts of the nature of those specified therein. *Hurd v. McClellan et al.* 213.

7. A WRIT OF ATTACHMENT MAY NOT ISSUE UPON AN APPEAL BOND.—An appeal bond conditioned that if the defendant shall duly prosecute his appeal and pay the judgment if the same shall be affirmed, then the obligation shall be void, otherwise it shall remain in full force, is not a written instrument for the direct payment of money, and will not sustain an attachment. *Ib.*

8. AMENDMENT OF SHERIFF'S RETURN OF ATTACHED REALTY.—When it appears that the notice of attachment upon realty, filed with the clerk and recorder, is correct, it is not error, on application supported by affidavits and notice to opposing counsel, to allow the sheriff to amend his return by correcting a misdescription of the realty attached. *McClure v. Smith*, 297.

9. WAIVER OF EXEMPTION RIGHTS.—Where the debtor was out of the state at the time of the levy, a letter to his creditor asking for a postponement of the case until he could "come down, and fix up everything satisfactory," but making no claim to exemption, was not a waiver of his exemption rights. *Harrington v. Smith*, 376.

10. ATTACHMENT AND SALE OF EXEMPT PERSONAL PROPERTY.—When a debtor has property of any kind in excess of the quantity covered by the exemption statute, it is his duty to interpose his claim of exemption prior to the sale, if he has notice of the levy and is in position to do so; but when he has only the amount, kinds and value of property covered by the statute, a levy upon and sale thereof is absolutely illegal, unless the exemption be waived. In such case it is the duty of the officer to set aside the exempt property. *Ib.*

11. LIEN OF ATTACHMENT NOT DESTROYED BY RELEASE OF PROPERTY UPON A FORTHCOMING BOND.—Under our statute the lien of an attachment is not destroyed by the delivery of the attached property to the defendant upon the execution of a forthcoming bond. *Stevenson v. Palmer*, 565.

12. CONTRACT FOR A SALE OF CHATTELS TO BE DELIVERED NOT A FRAUDULENT CONVEYANCE.—A contract by merchants to furnish supplies and money to mine-owners, and to receive therefor ore as it is mined, is not a present absolute sale of the ore, and therefore not within the statute declaring that every sale of chattels, unless accompanied by an immediate delivery and a continued change of possession, shall be conclusively presumed fraudulent as against creditors of the vendor, although the contract contains the words "sells, assigns and transfers." *Finding v. Hartman*, 596.

13. THE TITLE TO CHATTELS VESTS, UNDER CONTRACT FOR SALE, ON THEIR DELIVERY.—The title to ores to be mined vests in the purchaser on their delivery, and a creditor of the mine-owners who subsequently attaches them takes nothing by his levy. *Ib.*

14. THE CONTRACT FOR SALE OF CHATTELS IS NOT ASSAILABLE FOR IRREGULARITY AFTER BEING CARRIED OUT.—The contract having been carried out by the mine-owners jointly, and title to the ores having vested in the merchants on delivery, an attaching creditor cannot assail the contract because it was executed in the name of only one of the mine-owners. *Ib.*

15. SALE AND DELIVERY OF CHATTELS—STATUTE OF FRAUDS.—A transfer and delivery of the stock in trade and fixtures of a mer-

ATTACHMENT—Continued.

chant in failing circumstances, in liquidation of his claim, the merchant being immediately appointed agent of his former creditor to sell out the property and close up the business, and the property being redelivered to him for that purpose, may be found within the prohibition of the statute of frauds as against a subsequent attaching creditor. *Baur v. Beall*, 383.

ATTORNEY AND CLIENT (see, also, **PRACTICE IN CIVIL ACTIONS**, 64, 66):

1. **ACTION BY AN ATTORNEY FOR COMPENSATION FOR LEGAL SERVICES—PLEADINGS AND EVIDENCE.**—In an action by an attorney for his fee, where no issue is raised by the pleadings on the point of plaintiff's right to practice law, evidence that he was not licensed to practice in the state at the time the services were rendered is inadmissible. *Bachman v. O'Reilly*, 433.

2. **HOW THE VALUE OF AN ATTORNEY'S SERVICES MAY BE PROVEN.** Evidence by attorneys in good standing and in active practice is admissible to prove the value of the services. *Ib.*

ATTORNEY IN FACT:

PERSONAL LIABILITY ON CONTRACT WITH STRANGERS.—A power of attorney authorized H. to receive funds becoming due W. from time to time under W.'s contract with Denver to build a sewer; it also authorized H. to disburse the same for labor done and materials furnished under the sewer contract, precisely as W. himself might do. W. made a written contract with L. for sewer pipe, by the terms of which L. was to receive a certain proportion of the price from time to time as the money was paid H. by the city; L. was also to have precedence in payment of the balance due for sewer pipe furnished from a certain percentage of W.'s compensation retained by the city until completion of the sewer. H. indorsed upon the contract for pipe his written acceptance thereof, stipulating, however, that such acceptance should be construed according to the terms of his power of attorney from W. *Held*, that H. was liable for a failure to carry out the terms of the sewer-pipe contract, allowing precedence in payment of the balance due thereon from the percentage reserved and paid him upon final acceptance of the sewer. *Laclede F. M. Co. v. Williams*, 37.

BILLS OF EXCEPTION: See **EXCEPTIONS AND BILLS OF EXCEPTION.**

BILLS OF EXCHANGE:

1. **NEGOTIABLE INSTRUMENTS—BONA FIDE PURCHASERS.**—Where A. indorses drafts in blank to B. for collection, and B., wrongfully assuming to be the owner, sells and disposes of them to C., who has no knowledge of the want of ownership in B., C. is invested with good title, so as to retain the proceeds as against A. *Coors v. German Nat. Bank*, 203.

2. C. is not chargeable with notice of ownership in A. by the fact that in B.'s letter, sending the drafts to C., they were described as "A.'s acceptances." *Ib.*

3. **TRUST FUNDS REMAIN SUCH THOUGH INTERMINGLED WITH OTHER MONEYS.**—Where, in pursuance of a previous understanding among all the parties, the plaintiff drew his draft upon a private banker for the amount of the debt of a third party, who was to and did furnish the drawee with funds to meet the same, and the draft was mailed by the plaintiff direct to the drawee, with directions to remit the proceeds to a certain bank for the plaintiff's credit, but after receipt of the money and before its remittance

BILLS OF EXCHANGE — Continued.

to the bank named the drawee died, leaving the fund mingled with other moneys of his bank, these circumstances did not make the fund a part of the decedent's estate. *First Nat. Bank v. Hummel*, 259.

BONDS:

1. **APPEAL BOND — ATTACHMENT CANNOT ISSUE UPON.**—An appeal bond conditioned that if the defendant shall duly prosecute his appeal and pay the judgment if the same shall be affirmed, then the obligation shall be void, otherwise it shall remain in full force, is not a written instrument for the direct payment of money, and will not sustain an attachment. *Hurd v. McClellan*, 218.

2. **LIABILITY OF SURETIES ON APPEAL BOND.**—Unless the plaintiff in error, whose appeal has been dismissed, procures a *superseedeas* within thirty days after the dismissal of his appeal, the sureties upon his appeal undertaking become liable thereon as in case of affirmance. *McMichael v. Groves*, 540.

3. **LIEN OF ATTACHMENT NOT DESTROYED BY RELEASE OF PROPERTY UPON A FORTHCOMING BOND.**—Under our statute the lien of an attachment is not destroyed by the delivery of the attached property to the defendant upon the execution of a forthcoming bond. *Stevenson v. Palmer*, 565.

CHANCERY: See **EQUITY**.

CHANGE OF VENUE: See **VENUE**.

CHARTERS: See **CORPORATIONS**.

CHATTEL MORTGAGE:

1. **SALE OF MORTGAGED GOODS TO PAY DEBT — TO SUSTAIN AN ACTION FOR CONVERSION A SURPLUS OR BAD FAITH MUST BE SHOWN.** An action brought to recover for an alleged surplus of a stock of goods delivered defendant on a bill of sale, to be resold by him and the proceeds applied in liquidation of the plaintiff's indebtedness, wherein the evidence fails to show the value of the stock so delivered, that a surplus of money or goods remained after payment of the debt, or that the defendant was guilty of bad faith in the disposal of the stock, cannot be maintained. *Beaton v. Wade*, 4.

2. **CONSEQUENCES OF FAILURE OF THE MORTGAGEE TO TAKE POSSESSION ON DEFAULT OF PAYMENT.**—After default in payment of a debt secured by a chattel mortgage the relations of the mortgagee to the property and the rights of creditors and subsequent purchasers in good faith are to be defined and determined by the principles applicable to the relation between vendees and creditors upon a sale of personal property. The mortgagee must take actual possession of the mortgaged property, and the possession must be open, notorious and unequivocal, such as to apprise the community, or those who are accustomed to deal with the party, that the goods have changed hands, and that the title has passed out of the mortgagor. Otherwise the property will be subject to levy and sale for the debts of the mortgagor, and to the rights of subsequent purchasers in good faith. *Aichison v. Graham*, 217.

3. **SAME — THE STATUTE DOES NOT AUTHORIZE THE MORTGAGOR TO RETAIN POSSESSION FOR TWO YEARS UNLESS SO SPECIFIED IN THE MORTGAGE.**—The statutory provision that the mortgage shall be "good and valid from the time it is so recorded, for a space of time not exceeding two years, notwithstanding the property mortgaged * * * may be left in the possession of the mortgagor,"

CHATTEL MORTGAGE — Continued.

does not authorize it to be retained by the mortgagor for that period of time unless it be so stipulated in the mortgage. Suffering mortgaged property to remain in possession of the mortgagor after default in payment is a fraud *per se*, and renders the mortgage void as to creditors both under the chattel-mortgage act and the statute of frauds. *Ib.*

4. **MORTGAGEE OF CHATTELS FOR ACCOMMODATION BOUND ONLY TO ORDINARY DILIGENCE.**— A party accepting a note and chattel mortgage, in his own name, to secure his own claim as well as the individual claim of another, as a matter of accommodation to the latter, and without compensation, is only bound to exercise ordinary diligence, and is not liable for a failure to realize on the securities without proof of negligence. *Cross v. Kistler*, 571.

CHOSE IN ACTION: See EXECUTION, 2.

CITIES AND TOWNS: See MUNICIPAL CORPORATIONS.

CLERICAL ERROR: See MISTAKE; AMENDMENT.

COLLATERAL SECURITY:

1. **PURCHASE OF CONTRACT HELD AS COLLATERAL SECURITY.**— The purchase by a debtor of his contract obligations from one holding the same as collateral security for a debt owing him by the payee does not discharge the purchaser from his obligations, but merely entitles him to a credit for the amount actually paid for the transfer in an action against him upon said obligations. *Moffatt v. Corning*, 104.

2. **A STIPULATION AGAINST ASSIGNMENT OF CONTRACT NOT VIOLATED BY ITS ASSIGNMENT AS COLLATERAL SECURITY.**— A provision in a contract for the sale of land that it shall not be "assignable or negotiable," and that the purchase money shall be payable only to the vendor, is not violated by an assignment of the contract by the vendor as collateral security, since the only effect of the provision was to prevent the title to the chose in action from passing to another so as to preclude the other parties to the contract from asserting any equity or defense which might arise between the original parties. *Butler v. Rockwell et al.* 125.

3. **A PROMISSORY NOTE GIVEN AS COLLATERAL SECURITY, WHEN VOID FOR WANT OF CONSIDERATION.**— A promissory note in the hands of the payee is void for want of consideration when it appears to have been executed solely as collateral security for an account already secured by a trust deed, which account and deed were, unknown to the maker of the note, previously assigned to a third party, to whom full payment has since been made. *Johnson v. Mitchell*, 227.

4. **A CLAIM AGAINST A COUNTY HELD AS COLLATERAL SECURITY NOT LIABLE TO GARNISHMENT.**— Where an order is given to a county clerk by one in the employ of the county to deliver all warrants issued to him to one J., as collateral security for a note attached to the order, the acceptance of such order by the written indorsement thereon of the county clerk perfects the assignment and places the assignor's claim against the county beyond the reach of garnishment. *Lewis v. Commissioners*, 371.

COMMON-LAW FORMS: See PLEADING, 14.

CONSTITUTION:

1. **CONSTITUTIONAL LAW — INCORPORATION OF CITY BY SPECIAL CHARTER BEFORE THE CONSTITUTION.**— Where, before the adoption of the state constitution, a city was incorporated under a special

CONSTITUTION — Continued.

charter, and no abandonment of this charter, and re-incorporation under the general laws relating to towns and cities, has taken place, the original charter, and amendments thereto, are not unconstitutional on the ground of special or local legislation; and, unless inconsistent with the constitution, they may stand. *Huer v. City of Central*, 71.

2. **CONSTITUTIONAL PROVISION FORBIDDING, NOT SELF-EXECUTING.**—The constitutional provision forbidding the making of profit by officials out of public funds, and classifying the forbidden act as a felony, is not self-executing. *In re Breene*, 401.

3. **MANDATORY REQUIREMENT CONCERNING TITLES OF BILLS.**—The constitutional inhibition against the passage of bills containing matters not embraced in the title is mandatory; but it should be liberally construed, so as to avert the evils against which it is aimed, and at the same time avoid unnecessarily obstructing legislation. *Ib.*

4. **OBJECT OF CONSTITUTIONAL MANDATE.**—The primary purpose of this constitutional provision is to avoid surprise and fraud upon the legislators and people in the enactment of laws; but a further important end is attained by avoiding surprise to those over whom the laws become operative. *Ib.*

5. **LIMITS OF LEGISLATIVE POWER RESPECTING TITLES OF BILLS.** The general assembly may within reason make the title of a bill as comprehensive as it chooses; but when it elects to limit the title to a particular subdivision of some general subject, the right to embody in the bill matters pertaining to other subdivisions of such subject is relinquished. *Ib.*

6. **TEST WHETHER SUBJECT-MATTER OF BILL IS CLEARLY INDICATED BY ITS TITLE.**—Nothing unreasonable, however, is required in this respect; and a matter is clearly indicated by the title when it is clearly germane to the subject mentioned therein. *Ib.*

7. **PENAL PROVISION OF REVENUE ACT RELATING TO THE LOANING OR USING OF STATE FUNDS UNCONSTITUTIONAL.**—Under a title providing "for the assessment and collection of revenue" was placed a provision making it a crime for the state treasurer to "loan out or in any manner use for private purposes" the public funds in his hands; held, that the penal provision was unconstitutional because not clearly expressed in the title. *Ib.*

8. **CONSTITUTIONAL TEST WHETHER A CRIMINAL OFFENSE IS A FELONY OR A MISDEMEANOR.**—Whether an offense not capital is to be deemed a felony or a misdemeanor is made to depend, under our constitution, on whether the same is punishable by imprisonment in the penitentiary or in the county jail. *Brooks v. People*, 413.

9. **WHERE THE STATUTE IS SILENT AS TO THE PLACE OF IMPRISONMENT, IT MUST BE IN COUNTY JAIL**—SECTION 2594, GENERAL STATUTES, UNCONSTITUTIONAL.—A person convicted of conspiracy to defraud under General Statutes of 1893, section 811, which does not prescribe the place of imprisonment, was illegally sentenced to confinement in the penitentiary instead of the county jail, since, where criminal statutes admit of two constructions, that is to be preferred which is most favorable to defendant. The provision of General Statutes, section 2594, that where the term of imprisonment exceeds six months the prisoner shall be confined in the penitentiary, is unconstitutional and void, the subject of the act in which it occurs not being clearly expressed in the title thereof as required by article 5, section 21, of the constitution. *Ib.*

10. **SUPREME COURT COMMISSION — CONSTITUTIONALITY OF ACT PROVIDING — PETITION FOR REHEARING.**—The constitutionality of

CONSTITUTION — Continued.

the legislative act providing for a supreme court commission is not necessarily involved upon the petition for a rehearing of a cause which had been referred to the commission in pursuance of said act. *De Votie v. McGerr*, 577.

11. DISPOSITION OF COURTS IN REGARD TO DECIDING CONSTITUTIONAL QUESTIONS.— Courts ordinarily decline to determine the constitutionality of legislative enactments in a case where the record presents some other and clear ground upon which the judgment may rest. *Ib.*

CONTEMPT OF COURT:

1. REFUSAL OF RECEIVER TO EXECUTE A DECREE APPEALED FROM.— The taking and perfecting of an appeal under the act of 1885 (since repealed) by the filing of the bond required by section 23, page 354, from a decree dissolving a temporary injunction, and ordering the receiver to deliver over possession of the property involved to the persons entitled thereto under the decree, operated as a *supersedeas* and stay of process and proceedings as to every part of the decree. The trial court being thus ousted of all power to enforce it, the receiver was not in contempt for declining to execute it pending the appeal. *Hurd v. People*, 207.

2. CONSTRUCTIVE CONTEMPT — AN AFFIDAVIT NECESSARY TO JURISDICTION.— When it is manifest from the course of the proceeding that the language of a petition for a change of venue on the ground of the alleged prejudice of the presiding judge is not a contempt *per se*, but only a constructive contempt, if any, the court is without jurisdiction to order a warrant of attachment to issue against the offender unless an affidavit be presented containing a statement of the facts constituting the contempt. The unsworn report of a committee appointed by the court to inquire into the matters alleged, itself unsworn, does not perform the office of an affidavit. *Thomas v. People*, 254.

CONTESTED ELECTION: See ELECTIONS.**CONTRACTS:**

1. MERGER OF UNADJUSTED EQUITIES.— Where claims, counter-claims and unadjusted equities exist or are asserted by two parties, one against the other, in relation to the purchase of a mine, their respective interests therein, claims for profits from sales of ores, and a lien claim asserted by one on the interest of the other for purchase money advanced, and pending this unsettled condition both parties, by separate instruments, convey and assign to a third person all their rights of property and claims of every nature pertaining to the subject-matters in dispute, all titles and claims of the parties are thereby merged in the purchaser. *O'Reilly v. Burns*, 7.

2. IMPEACHMENT OF CONTRACT FOR ALLEGED INEQUITABLE PROVISIONS.— Where one of the stipulations in a contract for the loan of money; to be invested in mining property is that the party loaning is to have an equal interest, for all time to come, in the profits derived from the development of the property, the question whether such stipulation should be adjudged void, as inequitable and unconscionable, is to be determined by a consideration of the situation of the parties at the time of entering into the contract, their intentions, the legal effect of their stipulations, the character of the security to be given for the proposed loan and the risk assumed in making it. *Ib.*

3. REFORMING CONTRACTS RELATING TO REAL ESTATE.— Instruments in writing relating to real estate, which through mistake or

CONTRACTS — Continued.

fraud fail to express the intentions of the parties thereto, may be reformed, as between the makers and subsequent purchasers with notice of the error, so as to express the intention of the parties. *Smith v. Brunk*, 75.

4. ATTORNEY IN FACT — PERSONAL LIABILITY ON CONTRACT WITH STRANGERS. — A power of attorney authorized H. to receive funds becoming due W. from time to time under W.'s contract with Denver to build a sewer; it also authorized H. to disburse the same for labor done and materials furnished under the sewer contract, precisely as W. himself might do. W. made a written contract with L. for sewer pipe, by the terms of which L. was to receive a certain proportion of the price from time to time as the money was paid H. by the city; L. was also to have precedence in payment of the balance due for sewer pipe furnished from a certain percentage of W.'s compensation retained by the city until completion of the sewer. H. indorsed upon the contract for pipe his written acceptance thereof, stipulating, however, that such acceptance should be construed according to the terms of his power of attorney from W. *Held*, that H. was liable for a failure to carry out the terms of the sewer-pipe contract, allowing precedence in payment of the balance due thereon from the percentage reserved and paid him upon final acceptance of the sewer. *Laclede F. M. Co. v. Williams*, 37.

5. PURCHASE BY A DEBTOR OF HIS OWN CONTRACT OBLIGATIONS FROM AN ASSIGNEE OF HIS CREDITOR — EFFECT OF THE TRANSACTION. — A person indebted upon a contract made with another party purchased the same from one to whom it had been assigned as collateral security for a debt, but without negotiation with the owner. *Held*, that the purchaser was entitled to set off the sum actually paid for said contract in action thereon by his creditor, but that his purchase of the contract did not operate to discharge him from its obligations. *Moffatt v. Corning*, 104.

6. ASSIGNMENT OF CONTRACTS — A STIPULATION AGAINST THE ASSIGNMENT OF A CONTRACT NOT VIOLATED BY ITS ASSIGNMENT AS COLLATERAL SECURITY. — A provision in a contract for the sale of land that it should not be "assignable or negotiable," and that the purchase money should be payable to the vendor, and "only to him, and none other," is not violated by the vendor assigning the contract as collateral security, as the only effect of such provision was to prevent the title to the chose in action from passing to another so as to preclude defendants from asserting any equity or defense that might arise between the original parties. *Buller v. Rockwell et al.* 125.

7. JOINT CONTRACT FOR THE PURCHASE OF REAL ESTATE. — A joint contract may exist for the purchase of real estate by virtue of which a beneficial interest will vest in all the contracting parties on the purchase thereof, regardless of performance on the part of each. *Bates v. Wilson et al.* 140.

8. HOW REAL PROPERTY MAY BE CHARGED WITH A TRUST IN THE PURCHASE THEREOF. — The purchase of real estate in the names of two persons, to be held by them for the benefit of themselves and a third person, in pursuance of a contract by the terms of which all three were to contribute money and perform services toward the purchase and perfecting of the title, charges the property with a trust in favor of such third person, which cannot be arbitrarily discharged. *Ib.*

9. TRANSFER OF STOCK IN TRADE BY INSOLVENT FIRM — RATIFICATION BY CREDITORS. — Where an insolvent firm has transferred

CONTRACTS—Continued.

all its property, taking notes in payment, its creditors who have not sought to have the sale set aside, but have treated it as legitimate by proceeding against the purchasers by attachment for the money due on the notes, cannot question the *bona fides* of the sale. *Sickman v. Abernathy*, 174.

10. **CONSTRUCTION OF INSURANCE CONTRACTS.**—Contracts of insurance, like other contracts, are to be interpreted according to the language employed by the parties; but courts of equity will relieve against any fraud or deception connected therewith. Where substantial ambiguity occurs in such contracts it may be explained as in other cases. *State Ins. Co. v. Horner*, 891.

11. **SAME.**—Contracts of insurance are to be considered and construed by the same rules of law and interpretation as other contracts, in order to carry out the intention of both parties. *State Ins. Co. v. Taylor*, 499.

12. **WHEN TERMS OF ORIGINAL CONTRACT OF HIRING ADMISSIBLE IN SUIT BY AN EMPLOYEE AGAINST A SUCCESSOR IN BUSINESS.**—Where a man in trade hired an assistant at a stipulated *per diem*, and afterwards, as agent of his wife, who succeeded to the property and business, continued to allow and pay him at the same rate for his services; but the wife, on assuming personal supervision, refused to allow and pay him at the same rate for the time then due, claiming that the contract made with the husband was not binding on her, it is proper for the plaintiff to prove the original contract of hiring. *McQuown v. Cavanaugh*, 188.

13. **CONSTRUCTION OF STATUTES AND CONTRACTS—APPLICATION THERETO OF THE PRINCIPLE OF NOSCITUR A SOCIIS** (Civil Code, 1883, § 95, subd. 14).—The code provision that "in all actions brought upon overdue promissory notes, bills of exchange, other instruments for the direct payment of money, and upon book-accounts, the creditor may have a writ of attachment issue upon complying with the provisions of this section" (Civil Code, 1883, § 95, subd. 14), in so far as it relates to written contracts, is to be limited to contracts of the nature of those specified therein. *Hurd v. McClellan*, 218.

14. **A WRIT OF ATTACHMENT MAY NOT ISSUE UPON AN APPEAL BOND.**—An appeal bond conditioned that if the defendant shall duly prosecute his appeal and pay the judgment if the same shall be affirmed, then the obligation shall be void, otherwise it shall remain in full force, is not a written instrument for the direct payment of money, and will not sustain an attachment. *Ib.*

15. **CONSIDERATION.**—A promissory note was given by defendant solely as collateral security for a debt due plaintiff on account. Before the giving of the note this account, together with a trust-deed securing it, had been assigned to a third person. Defendant was ignorant of such assignment, and would not have executed the note had he known of it. After the assignment, and before the commencement of suit on the note, the assignee received payment in full of the account in question. The note had not been negotiated. *Held*, that plaintiff could not recover, there being no consideration for the note. *Johnson v. Mitchell*, 227.

16. **JOINT AND SEVERAL OBLIGATIONS.**—Under Civil Code, section 18, and General Statutes, section 1831, making joint instruments several also, the holder of a note who sues the maker and indorser as joint makers, dismisses as to the indorser, without prejudice, and obtains judgment against the maker, may afterwards sue the indorser. *Hamill v. Ward*, 277.

17. **ACCOMMODATION UNDERTAKING.**—A party accepting a note and chattel mortgage in his own name, to secure his own claim,

CONTRACTS—Continued.

as well as the claim of another, as a matter of accommodation to the latter and without compensation, is only bound to exercise ordinary diligence, and is not liable for a failure to realize on the securities without proof of negligence. *Cross v. Kistler*, 571.

18. **CONTRACT FOR A SALE OF CHATTELS TO BE SUBSEQUENTLY DELIVERED NOT A FRAUDULENT CONVEYANCE.**—A contract under which a firm of merchants are to furnish supplies and money to the owners of a mine, and in return are to receive ore as mined, is not a present absolute sale of the ore, though it contains the words "sells, assigns and transfers;" and it is therefore not within the provision of the General Statutes of Colorado, chapter 43, section 14, declaring that every sale of chattels, unless accompanied by an immediate delivery and a continued change of possession, shall be conclusively presumed fraudulent as against creditors of the vendor. *Finding v. Hartman*, 596.

19. **TITLE TO THE CHATTEL VESTS UNDER THE CONTRACT ON DELIVERY.**—Under such a contract title to the ore vests in the merchants on its delivery, and a creditor of the mine-owners who thereafter attaches it takes nothing by his levy. *Ib.*

20. **THE CONTRACT IS NOT ASSAILABLE FOR IRREGULARITY AFTER DELIVERY.**—The contract having been carried out by the mine-owners jointly, and title to the ore having vested in the merchants on its delivery, the attaching creditor cannot assail the contract because it was executed in the name of only one of the mine-owners. *Ib.*

21. **WHEN FAILURE TO COMPLETE CONTRACT AMOUNTS TO A CONVERSION.**—Plaintiff moved a building for defendant, placing it in position on its new site upon blocks furnished by plaintiff, on which it was to rest ten days, when defendant was to have a permanent foundation placed under it and the blocks released. A failure of defendant to comply with his contract amounts to a conversion of the blocks, if they are not otherwise removable, the measure of damages being the value thereof at date of conversion. *Ford v. Roberts*, 291.

CONVERSION:

1. **WHEN FAILURE TO COMPLY WITH CONTRACT AMOUNTS TO A CONVERSION.**—Where plaintiff moved a building for defendant, placing it in position on its new site, elevated on blocks furnished by the plaintiff, on which it was to rest ten days, in which time defendant was to have a permanent foundation placed under it and the blocks released, a failure on part of the defendant to comply with his contract amounts to a conversion, if the blocks are not otherwise capable of removal; and the measure of plaintiff's damages is the value of the blocks at the date of conversion. *Ford v. Roberts*, 291.

2. **ACTION FOR SURPLUS OF A STOCK OF GOODS.**—Where a stock of goods was delivered by plaintiff to defendant on a bill of sale to be resold and the proceeds applied in liquidation of plaintiff's indebtedness, an action brought to recover for an alleged surplus cannot be maintained without proof of the value of the goods, or that a surplus of money or goods remained after the payment of the debt, or that the defendant was guilty of bad faith in their disposal. *Beaton v. Wade*, 4.

CONVEYANCE: See **DEED; MORTGAGE; CHATTEL MORTGAGE.**

CORPORATIONS (see, also, **MUNICIPAL CORPORATIONS**):

1. **TRANSFER OF STOCK.**—Under the laws of this state, title to stock in a corporation, as against creditors, can only pass by transfer on the books of the company. *Conway v. John*, 80.

CORPORATIONS — Continued.

2. **WHAT IS SUFFICIENT TO CONSTITUTE A CORPORATION DE JURE.** A certificate of incorporation which provides that the corporate affairs shall be controlled by its president, vice-president and attorney, instead of providing for a board of directors or trustees, as required by General Statutes 1863, section 238, is insufficient to create a corporation *de jure*. *Bates v. Wilson et al.* 140.

3. **WHO IS ESTOPPED TO DENY DE FACTO EXISTENCE OF A CORPORATION DE JURE.** — One who has signed such certificate, has conveyed property to the company, and has acted as one of its officers, is estopped from denying its *de facto* existence. *Ib.*

4. **CERTIFICATE OF INCORPORATION — CONSTRUCTION OF AMBIGUOUS LANGUAGE.** — Where three owners of mining property, each owning an undivided one-third interest, organize a corporation, and convey to it the said property in payment for all its stock, which, by the certificate of incorporation signed by the three, is to be "divided half and half between the parties," each incorporator is entitled to one-third of the capital stock. *Ib.*

5. **NEGLIGENCE OF MINING COMPANY — DAMAGES TO AN EMPLOYEE OCCASIONED THEREBY.** — Where a mine is operated by a company through an incline extending from the surface several hundred feet into the earth, by means of cars run upon iron rails therein, and it is an established rule of the company that a signal called a "tally" shall be sounded at a certain hour every evening, at which time the cars shall cease running up and down the incline and the workmen shall have the right of way for the space of seven minutes to reach the surface, it is negligence on the part of the company to permit a car to go down the incline after the "tally" is sounded, and a miner injured thereby is entitled to recover damages. *Silver Cord C. M. Co. v. McDonald*, 191.

6. **ESTOPPEL BY CONDUCT.** — Defendant, through its negligence, having put plaintiff in a position of danger, could not complain that he did not exercise cool presence of mind in his endeavor to escape therefrom. *Ib.*

CO-TENANTS: See **JOINT TENANTS AND TENANTS IN COMMON.**

COUNTY COURT (see, also, **COURTS**):

1. **WILLS — THE FIRST PLACE OF PROBATE IS THE TESTATOR'S LAST DOMICILE — PRESUMPTION CONCERNING — HOW THE PROBATE AND RECORD MAY BE QUESTIONED.** — A will should be first admitted to probate in the jurisdiction of the testator's last domicile; but in admitting a will to probate the court must be presumed *prima facie* to base its adjudication respecting the last domicile upon sufficient evidence, and, under such circumstances, the probate and record thereof can only be questioned by some appellate or direct proceeding. *Corrigan v. Jones*, 811.

2. **LETTERS TESTAMENTARY OR OF ADMINISTRATION HAVE NO EXTRATERRITORIAL FORCE.** — The general rule is that letters testamentary or of administration have no extraterritorial force. When such letters have been duly granted in the jurisdiction of deceased's last domicile, they are the principal letters of authority, and those granted in other jurisdictions are ancillary. *Ib.*

3. **HOW A WILL MAY BE PROBATED WHICH WAS FIRST ADMITTED TO PROBATE IN A FOREIGN STATE — LETTERS TESTAMENTARY MAY ISSUE THEREON.** — A will admitted to probate in the court of another state having jurisdiction of such matters is, on the presentation of the duly certified record thereof, entitled to be admitted to probate and record in this state, and letters testamentary or of administration may issue thereon as in other cases. The probate

COUNTY COURT—*Continued.*

and record, under such circumstances, would seem to be mandatory; but the court is invested with discretion in the matter of issuing letters, but the discretion is not arbitrary. It must be sound and reasonable,—such as will secure the administration of the estate according to the will of the deceased, as well as with due regard to local creditors. *Ib.*

4. TAKING AN APPEAL FROM THE COUNTY TO THE DISTRICT COURT.—An appeal is not taken from the county to the district court by reason of the fact that it is "prayed and allowed." The appeal is not "taken" until it is perfected by the filing of an appeal bond, and if this be not done on the day on which the judgment is rendered, the notice in writing must be served or the appeal may be dismissed. *Law v. Nelson*, 409.

5. ELECTION CONTEST—CHANGE OF JUDGE AFTER COMMENCEMENT OF TRIAL—TRIAL DE NOVO.—A county election contest may be tried notwithstanding a change of county judges after the commencement of the trial; but in such case the trial must be *de novo*. *Clanton v. Ryan*, 419.

6. APPEAL FROM COUNTY COURT TO DISTRICT COURT—WAIVER OF NOTICE.—The failure to serve notice of an appeal from the county court to the district court, as required by statute, is waived and cured by the appellee's full appearance in the district court. *Robertson v. O'Reilly*, 441.

COURTS:

1. CERTIORARI FROM DISTRICT TO COUNTY COURTS.—Compared with the district courts, the county courts are, in point of jurisdiction, inferior to, and their judgments and proceedings are subject to review by writs of *certiorari* from, the district courts, as provided by chapter 28 of the code. *In re Rogers*, 18.

2. PREMATURE ISSUE OF WRIT OF CERTIORARI.—It is only the final determination of an inferior tribunal which can be reviewed on a writ of *certiorari*. When it is sought to review thereby orders and proceedings in a cause preliminary to final judgment the writ will be quashed. *Schwarz v. County Court*, 44.

3. APPEALS FROM POLICE MAGISTRATES.—Under the charter of the city of Central an appeal lies from a judgment of the police magistrate to the district court, but it is to be granted in the same manner and prosecuted with the same effect as appeals under the present laws from justices of the peace to the county court are granted and prosecuted. *Huer v. City of Central*, 71.

4. ERROR TO DISMISS CAUSE FOR WANT OF JURISDICTION WHEN PENDING ON APPEAL.—On such an appeal, irrespective of the question of jurisdiction, the district court was not authorized to dismiss the cause. *Ib.*

5. AUTHORITY AND DUTY OF DISTRICT JUDGES TO HOLD COURTS FOR EACH OTHER.—The judges of the district court may hold courts for each other, and it is their duty so to do under certain circumstances. *Empire L. & C. Co. v. Engley*, 289.

6. JUDGE'S AUTHORITY PRESUMED.—When a district judge holds a term of court outside his own district, his authority so to do, and to try the causes pending in such court, will be presumed unless the contrary appears. *Ib.*

7. BILL OF EXCEPTIONS TO BE AUTHENTICATED BY THE JUDGE WHO TRIES THE CAUSE.—When one district judge tries a cause for another, the judge actually presiding is the proper one to authenticate the bill of exceptions as to any and all rulings excepted to before him on the trial. *Ib.*

COURTS—Continued.

8. WHEN TWO OR MORE DISTRICT JUDGES MAY NOT ACT TOGETHER.—Two or more district judges cannot lawfully sit and act together as a district court in this state, except as they sit in bank for the purposes specified in the act of April 2, 1887. *People ex rel. v. Rucker*, 396.

9. DISPOSITION OF COURTS CONCERNING THE DECISION OF CONSTITUTIONAL QUESTIONS.—Courts ordinarily decline to determine the constitutionality of a legislative enactment in a case where the record presents some other and clear ground upon which the judgment may rest. *De Votie v. McGerr*, 577.

10. FORFEITURE OF EQUITIES BY UNREASONABLE DELAY.—Courts of equity will only grant relief where the application therefor is made without unreasonable delay. *Great West. M. Co. v. W. of A. M. Co.* 90.

11. CONSTRUCTIVE CONTEMPT OF COURT.—In a case of constructive contempt of court, the judge is without jurisdiction to order a warrant of attachment to issue against the offender unless an affidavit be presented containing a statement of the facts constituting the contempt. *Thomas v. The People*, 254.

CRIMINAL LAW:

1. KEEPING OPEN TIPPLING-HOUSE ON SUNDAY.—By the general law of the state the keeping open of a tippling-house on the Sabbath day or night is made a criminal offense, punishable by fine or imprisonment; and the fact that such house is situate in the city of Denver will not avail as a defense under the present city charter. *Heinssen v. State*, 228.

2. CUSTODIANS OF PUBLIC MONEYS—CONSTITUTIONAL INHIBITION AGAINST APPROPRIATION OF INTEREST NOT SELF-EXECUTING. The appropriation of interest received by a state treasurer from bankers with whom the public funds are deposited for safe-keeping is not an offense at common law, and the constitutional provision forbidding the same and classifying the act as a felony is not self-executing. *In re Breene*, 401.

3. PENAL PROVISION OF REVENUE ACT AGAINST LOANING OR USING STATE FUNDS UNCONSTITUTIONAL.—A statute making it a crime for the state treasurer to "loan out or in any way use for private purposes" public funds, under the title of "An act to provide for the assessment and collection of revenue, and to repeal certain acts in relation thereto," is invalid as to the criminal offense, the same not being indicated or expressed in the title. *Ib.*

4. CONSTITUTIONAL TEST WHETHER A CRIMINAL OFFENSE IS A FELONY OR A MISDEMEANOR.—Whether an offense not capital is to be deemed a felony or a misdemeanor is made to depend, under our constitution, on whether the same is punishable by imprisonment in the penitentiary or in the county jail. *Brooks v. People*, 413.

5. WHERE THE STATUTE IS SILENT AS TO THE PLACE OF IMPRISONMENT, IT MUST BE IN COUNTY JAIL.—SECTION 2594, GENERAL STATUTES, UNCONSTITUTIONAL.—A person convicted of conspiracy to defraud under General Statutes of 1883, section 811, which does not prescribe the place of imprisonment, was illegally sentenced to confinement in the penitentiary instead of the county jail, since, where criminal statutes admit of two constructions, that is to be preferred which is most favorable to defendant. The provision of General Statutes, section 2594, that where the term of imprisonment exceeds six months the prisoner shall be confined in the penitentiary, is unconstitutional and void, the subject of the act in which it occurs not being clearly expressed in the title thereof as required by article 5, section 21, of the constitution. *Ib.*

CRIMINAL LAW — Continued.

6. **CONSTRUCTIVE CONTEMPT OF COURT.**—In case of a constructive contempt of court the judge is without jurisdiction to order a warrant of attachment to issue against the offender unless an affidavit be presented containing a statement of the facts constituting the contempt. *Thomas v. People*, 254.

DAMAGES:

1. **MEASURE OF DAMAGES FOR FAILURE TO PERFORM CONTRACT.** Plaintiff moved a building for defendant, placing it in position on its new site elevated on blocks furnished by plaintiff, on which it was to rest ten days, in which time defendant was to have a permanent foundation placed under it and the blocks released. A failure on part of defendant to comply with his contract entitles plaintiff to the expense of the removal of the blocks, if their removal be practicable. If not defendant's default amounts to a conversion, and the plaintiff may recover as damages the value of the blocks at the date of the conversion. *Ford v. Roberts*, 291.

2. **MEASURE OF DAMAGES — RULE FOR ASCERTAINING THE VALUE OF INSURED BUILDING DESTROYED BY FIRE.**—In a suit on an insurance policy on a house destroyed by fire, the measure of damages is the value at the time of the loss; and, to arrive at that, the original cost, the cost of a like building at the time of the trial, and the difference in value between the house burned and a new one, by reason of age and use, are all proper subjects of inquiry. *State Ins. Co. v. Taylor*, 499.

3. **DAMAGE BY ESCAPING WATER FROM IRRIGATING DITCH — STATUTORY LIABILITY OF DITCH OWNERS.**—Where owners of an irrigating ditch recklessly attempted to convey a volume of water through it far beyond the reasonable capacity of the ditch to safely carry, and in so doing knowingly caused the ditch to overflow its banks, thereby flooding the land of an adjacent proprietor, and destroying his fruit trees and vines growing thereon, they became liable to respond in damages under General Statutes, sections 812, 1728, 1733. *Greeley Irrigating Co. v. House*, 549.

4. **HIGHWAYS — RIGHT OF ACTION BY ABUTTING OWNERS FOR OBSTRUCTION.**—A land-owner whose land abuts upon a public highway, and having rights therein for purposes of travel and use unshared in common by the general public, may maintain an action for consequential damages against one obstructing the same and depreciating his property. *Town of Longmont v. Parker*, 886.

5. **DAMAGES ARE RECOVERABLE BY AN EMPLOYEE OF A MINING COMPANY OCCASIONED THROUGH NEGLIGENCE OF THE COMPANY TO OBSERVE ITS OWN RULES.**—Where, by rule of the company, seven minutes from the sounding of a signal are given the miners underground to reach the surface, it is negligence for the company to permit a car to go down the incline up which the miners are ascending during this interval, and it is responsible in damages for an injury thus occasioned. *Silver Cord C. M. Co. v. McDonald*, 191.

DEBTOR AND CREDITOR:

1. **A STIPULATION AGAINST THE ASSIGNMENT OF A CONTRACT NOT VIOLATED BY ITS ASSIGNMENT AS COLLATERAL SECURITY.**—The only effect of a provision in a contract for the sale of land that it shall not be "assignable or negotiable," and that the purchase money shall be payable to the vendor, and "only to him and none other," is to preserve the title to the contract from passing to another so as to preclude the purchaser from asserting any equity or defense that might arise between the original parties. *Butler v. Rockwell*, 125.

DEBTOR AND CREDITOR—*Continued.*

2. TRANSFER OF STOCK IN TRADE BY INSOLVENT FIRM—RATIFICATION BY CREDITORS.—Where an insolvent firm has transferred all its property, taking notes in payment, its creditors, who have not sought to have the sale set aside, but have acquiesced in it, and treated it as legitimate, by proceeding against the purchasers by attachment for the money supposed to be due on the notes, cannot question the *bona fides* of the sale. *Sickman v. Abernathy*, 174.

3. VALIDITY OF PAYMENTS MADE BY PURCHASERS OF STOCK CANNOT BE QUESTIONED COLLATERALLY.—Nor can they in any such proceeding attack the validity of payments made by the purchasers, though the latter had knowledge of the firm's indebtedness, since there is no privity between them and the purchasers. *Ib.*

4. RIGHT OF PARTNERSHIP FIRM TO CONTRACT AS TO MANNER OF PAYMENT OF NOTES TO BECOME DUE IT ON SALE OF ITS EFFECTS.—In such proceeding, evidence as to contracts between the firm and the purchasers, as to the application on notes of accounts due the firm by the partners individually, and assigned to the purchasers with the other firm accounts, is immaterial, since the parties had a right to make any contract they chose as to the mode of paying the notes. *Ib.*

5. CREDITOR'S LIEN ONLY EXISTS WHEN PROPERTY IS IN CUSTODIA LEGIS.—No creditor's lien can attach to the partnership assets of an insolvent firm until they have been brought into the custody of the law by the interposition of the court. *Ib.*

6. CHATTEL MORTGAGE—CONSEQUENCES OF FAILURE OF THE MORTGAGEE TO TAKE POSSESSION ON DEFAULT OF PAYMENT.—After default in payment of a debt secured by a chattel mortgage the relations of the mortgagee to the property and the rights of creditors and subsequent purchasers in good faith are to be defined and determined by the principles applicable to the relation between vendees and creditors upon a sale of personal property. The mortgagee must take actual possession of the mortgaged property, and the possession must be open, notorious and unequivocal, such as to apprise the community, or those who are accustomed to deal with the party, that the goods have changed hands, and that the title has passed out of the mortgagor. Otherwise the property will be subject to levy and sale for the debts of the mortgagor, and to the rights of subsequent purchasers in good faith. *Atchison v. Graham*, 217.

7. SAME—THE STATUTE DOES NOT AUTHORIZE THE MORTGAGOR TO RETAIN POSSESSION FOR TWO YEARS UNLESS SO SPECIFIED IN THE MORTGAGE.—The statutory provision that the mortgage shall be "good and valid from the time it is so recorded, for a space of time not exceeding two years, notwithstanding the property mortgaged * * * may be left in the possession of the mortgagor," does not authorize it to be retained by the mortgagor for that period of time unless it be so stipulated in the mortgage. Suffering mortgaged property to remain in possession of the mortgagor after default in payment is a fraud *per se*, and renders the mortgage void as to creditors both under the chattel-mortgage act and the statute of frauds. *Ib.*

8. SALE BY DEBTOR IN FAILING CIRCUMSTANCES TO A CREDITOR OF HIS ENTIRE STOCK IN TRADE.—Where a merchant in failing circumstances transfers and delivers to a creditor, in liquidation of his claim, his entire stock in trade and fixtures, and an hour or two afterwards the latter appoints him his agent to sell the stock and close up the business, redelivering to him the possession for

DEBTOR AND CREDITOR — Continued.

that purpose, whereupon the goods are attached at the suit of another creditor of the debtor, a jury is justified in finding that the sale was not accompanied by an immediate delivery and followed by an actual and continued change of possession, as required by section 14 of the statute of frauds (Gen. St. p. 500). *Baur v. Beall*, 888.

9. **PURCHASE BY A DEBTOR OF HIS OWN CONTRACT OBLIGATIONS.** The legal effect of a purchase, by a debtor, of his own contract obligations from one who obtained them from his creditor as collateral security, is simply to entitle the purchaser to a credit on his own contract with his creditor, of the sum actually paid the assignee for the transfer, but not to invest him with absolute ownership of the contract, so as to release him of his contract obligations. *Moffatt v. Corning*, 104.

10. **ACTION BY DEBTOR TO RECOVER OF HIS CREDITOR FOR AN ALLEGED SURPLUS.** — To entitle a debtor to recover for an alleged surplus of a stock of goods delivered by him to his creditor on a bill of sale, to be resold and the proceeds applied in liquidation of his indebtedness, he must prove the value of the stock so delivered, or that a surplus of money or goods remained after payment of the debt, or that the defendant was guilty of bad faith in their disposal. *Beaton v. Wade*, 4.

DEDICATION:

WHAT IS NECESSARY TO CREATE AN EASEMENT IN STREETS AND ALLEYS. — Where the owner of a block in a city divides it into lots, with an alley in the rear, but files no plat, as required by statute in case of dedication, and the city does not accept the new arrangement, the purchaser of the alley-way at a sale for taxes takes it free from the easement, and may close it. *Smith v. Griffin*, 429.

DEED:

1. **CONVEYANCES FRAUDULENT IN FORM MAY BE SHOWN TO BE BONA FIDE LIENS.** — A deed absolute in form may be shown by collateral proofs to have been executed in good faith to secure an actual indebtedness, and in such case is not fraudulent as to the grantor's creditors. *McClure v. Smith*, 297.

2. **A DEED ABSOLUTE IN FORM MAY BE SHOWN TO BE A MORTGAGE — ACKNOWLEDGMENT.** — A deed of realty, absolute in form, may be shown by clear and unequivocal parol proofs to be in effect a mortgage, and an unacknowledged deed may be effectual in passing title to realty. *Armor v. Spalding*, 302.

3. **A CONVEYANCE SUBJECT TO CONDITION VESTS A QUALIFIED FEE.** — A conveyance of lots to a school district by the owner in fee, by an ordinary quitclaim deed, subject to a condition inserted therein, that the lots were to be used for school purposes, and when such use should cease the property should revert to the grantor, vests in the grantee a qualified fee, and, until the happening of the event named, the grantor is divested of all right, title and interest in the land. *D. & S. F. Ry Co. v. School District*, 327.

EASEMENT:

WHAT IS NECESSARY TO CREATE AN EASEMENT IN STREETS AND ALLEYS. — Where the owner of a block in a city divides it into lots, with an alley in the rear, but files no plat, as required by the statutes in the case of a dedication, and the city does not accept the new arrangement, the purchaser of the alley-way at a sale for taxes takes it free from easement, and may close it. *Smith v. Griffin*, 429.

EJECTMENT:

1. A JUDGMENT IN FAVOR OF A LANDLORD AGAINST HIS TENANT FOR POSSESSION, NO BAR TO AN ACTION BY AN HEIR OF THE TENANT AGAINST THE LANDLORD UNDER A CLAIM OF TITLE.—A judgment in ejectment, by a landlord against his tenant for breach of the conditions of the lease, will not bar a subsequent action against the landlord by an heir of the tenant to recover the land, on the ground that a patent therefor was issued to the tenant during his tenancy, as in the former action the tenant was estopped to deny his landlord's title. *Arnold v. Woodward*, 164.

2. THE POSSESSION OF THE LANDLORD RECOGNIZED BY THE INSTITUTION OF SUIT BY THE HEIR.—The bringing of the action by the heir of the tenant is a sufficient recognition that the relation of landlord and tenant had been terminated, so as to entitle the heir to sue for possession under the patent, where the landlord was, and had been for years, in possession under the judgment in the former action. *Ib.*

3. CONSTRUCTION OF THE CLAUSE, "A CLAIM AND COLOR OF TITLE MADE IN GOOD FAITH."—Under General Statutes, section 2186, requiring "a claim and color of title made in good faith" as ground of adverse possession, one cannot hold adversely to another when he knows that his entry in the land-office has been set aside or disregarded, and a patent has issued to the person against whom he claimed an adverse holding. *Ib.*

4. CONSEQUENCE OF FAILURE TO ALLEGE SPECIAL DAMAGE IN EJECTMENT.—Where the complaint in ejectment contains no allegation of special damage, the damages recoverable cannot include the value of the use of the premises by defendant. *Ib.*

5. NO REVERSIONARY ESTATE IN GRANTOR CAPABLE OF CONVEYANCE UNTIL HAPPENING OF THE CONTINGENCY.—Until the happening of the event mentioned in the deed the grantor is not vested with an estate in reversion, for the contingency upon which such an estate depends may never happen. Having nothing to convey, therefore, if he should assume, in expectancy of a possible reverter, to execute a deed to a subsequent purchaser, it would not invest his grantee with any right or interest in the land, present or contingent, but would be wholly without legal force or effect; and if the second grantee should enter into possession of a portion of the estate under such a conveyance, the owner of the qualified fee could oust him therefrom by an action of ejectment. *D. & S. F. Ry Co. v. School District*, 827.

6. FORCIBLE ATTEMPT TO ACQUIRE RIGHT OF WAY—EJECTMENT—ESTOPPEL.—If a railway company without right enters upon the land of a citizen who is vested with the exclusive right of possession, and attempts to construct its road-bed over the same, the citizen may procure its expulsion by an action of ejectment, provided he does not acquiesce in the possession so taken, or, by affirmative acts, laches or other conduct, place himself and the railway company in such a position as to make it inequitable for him to insist upon a restoration of the possession. Conduct of the character mentioned would limit his recovery to the value of the land taken. *Ib.*

ELECTIONS:

1. ELECTION CONTEST—REQUIREMENTS OF STATEMENTS AND COUNTER-STATEMENTS OF THE PARTIES TO THE ACTION—CONSTRUCTION OF STATUTE.—A proper construction of the act of 1885 (Laws 1885, p. 197), providing for contesting the election of county officers, requires each party to give the other notice, in the statements filed, of the names of such persons as he claims illegally voted for his

ELECTIONS — Continued.

competitor, and those whose votes for himself were illegally rejected. *Schwarz v. County Court*, 44.

2. JURISDICTION OF COUNTY COURT.— The statements required by the statute are necessary to give the courts jurisdiction; and where no effort is made by the contestor to comply with the requirements of the act in this regard, and a plea to the jurisdiction of the court is interposed by the contestee, setting up such defect, the court is without jurisdiction to proceed with a trial upon the merits. The statute furnishes a complete system of procedure within itself, and before a contestor can legally invoke the jurisdiction of the court he must state the facts required to bring his case within the purview of the statute. *Ib.*

3. ATTEMPT TO EXCUSE OMISSIONS IN STATEMENT.— The omission to furnish the list of names required by statute cannot be justified by subsequently alleging that the information necessary to prepare the same was in the hands of contestee, by whose fraud and violence contestor was prevented from obtaining it, when no effort was made in the first instance to either comply with the statute or to excuse the failure. *Ib.*

4. UNSEASONABLE OFFER TO AMEND STATEMENT.— Where it does not appear that any attempt has been made to comply with the statutory requirement by furnishing the list, and no excuse is offered for failing to do so, amendment of the petition for that purpose, at a late day in the proceedings, is unwarrantable, in the absence of a statute directly authorizing its amendment. *Ib.*

5. WRIT OF CERTIORARI— WHEN PREMATURELY ISSUED WILL BE QUASHED.— It is only the final determination of an inferior tribunal which can be reviewed upon a writ of *certiorari*. When it is sought to review thereby orders and proceedings in a cause preliminary to final judgment the writ will be quashed. *Ib.*

6. ELECTION CONTESTS— PLEADINGS AND PRACTICE IN SUPREME COURT.— A general averment of election frauds or the intimidation of voters is insufficient; under the rules of the supreme court in relation to election contests, proper ultimate facts must be pleaded as in other cases. *Todd v. Stewart*, 286.

7. CHARACTER OF EVIDENCE REQUIRED IN SUCH CASES.— Mere rumors circulated and arguments advanced against particular candidates during political campaigns, however false or malicious, cannot affect the determination of such cases. *Ib.*

8. WHAT CONTESTOR MUST SHOW.— If the contestor does not show that by reason of the illegal casting or rejection of votes the result is different from what it would otherwise have been, the proceeding should not be entertained. *Ib.*

9. ELECTION CONTEST— CHANGE OF JUDGE AFTER COMMENCEMENT— TRIAL DE NOVO.— A county election contest may be tried notwithstanding a change of county judges after the commencement of the trial; but in such case the trial must be *de novo*. *Clanton v. Ryan*, 419.

10. WHEN RECOUNT OF BALLOTS SHOULD BE ORDERED.— Where the cause of contest alleged is error, mistake, fraud, misconduct or corruption in the counting or declaring the result of an election, a recount of the ballots should be ordered as a matter of course upon request of the complaining party. *Ib.*

11. THE BALLOTS MAY BE COMPARED WITH THE POLL LISTS.— Upon the production of evidence tending to show error, mistake, fraud, misconduct or corruption on the part of the election boards or any of its members, in the matter of receiving, numbering, depositing or canvassing the ballots, or other illegal or irregular conduct in respect thereto, an inspection and comparison of the ballot

ELECTIONS — Continued.

with the poll lists should be allowed, in connection with the oral evidence in reference thereto. *Ib.*

12. EVIDENCE — MATERIAL AVERMENTS MUST BE PROVEN BY CONTESTOR.— In a county election contest, the statement of contestor that he is "an elector of the county" is a material averment, and, if denied by the answer, must be proved, or the contest as such must fail; nor is the contestor excused from producing evidence in support of such averment on the ground that other competent evidence is refused. *Ib.*

EMINENT DOMAIN:

1. EMINENT DOMAIN — PROCEEDINGS AT SUIT OF A RAILWAY COMPANY FOR RIGHT OF WAY PENDING THE SUSPENSION OF A PRE-EMPTION CLAIM — DISCRETION OF COURT.— When the entry of a pre-emption claimant has been suspended, and proceedings to condemn a right of way through the land for a railroad have been instituted, the claim of the railway company for a continuance of the latter proceedings pending the determination of the suspended entry by the department of the general land-office appeals strongly to the discretion of the court. *Colorado M. R'y Co. v. Bowles*, 85.

2. FORCIBLE ATTEMPT TO ACQUIRE RIGHT OF WAY — EJECTMENT — ESTOPPEL.— If a railway company without right enters upon the land of a citizen who is vested with the exclusive right of possession and attempts to construct its road-bed over the same, the citizen may procure its expulsion by an action of ejectment, provided he does not acquiesce in the possession so taken, or, by affirmative acts, laches, or other conduct, place himself and the railway company in such a position as to make it inequitable for him to insist upon a restoration of the possession. Conduct of the character mentioned would limit his recovery to the value of the land taken. *D. & S. F. R'y Co. v. School District*, 327.

EQUITY:

1. REFORMING INSTRUMENTS AT THE SUIT OF AN INDORSEE TO EXPRESS THE MEANING OF THE ORIGINAL PARTIES THERETO.— At the time of the execution of a negotiable note the maker also executed a title-bond, agreeing to convey to the payee an undivided one-half interest in certain mining claims, which were carefully described. It was also agreed that the payee should have a lien on these premises for the payment of the note, and the maker inserted a special condition, providing that "this bond shall be and remain a special lien upon, and for the payment" of, the note; but by mistake or fraud he omitted the words "the said property above described" after the words "lien upon." *Held*, that as between an indorsee of the note and the maker, and as against subsequent purchasers or incumbrancers of the premises, with full notice of the payee's and indorsee's rights, the bond would be reformed so as to express the meaning of the parties thereto. *Smith v. Brunk*, 75.

2. PRACTICE IN COURTS OF EQUITY — RIGHTS FORFEITED BY LACHES OF PARTIES.— Courts of equity will only grant relief in case the application therefor is made without unreasonable delay. The strongest equity may be forfeited by laches or abandoned by acquiescence. *Great West. M. Co. v. W. of A. M. Co.* 90.

3. FLUCTUATING CHARACTER OF PROPERTY TO BE CONSIDERED IN DETERMINING LACHES — MINING CLAIMS.— Where the subject-matter of a controversy is the right to unpatented mining property, the uncertain and fluctuating character of the property will be considered in determining the question of laches. *Ib.*

EQUITY — Continued.

4. **STATUTE OF LIMITATIONS SUPERIOR TO COURTS OF EQUITY.**—The statute of limitations fixes a limit beyond which the courts cannot extend the time, but within this limit the peculiar doctrine of courts of equity will prevail. *Ib.*

5. **DECREE IN EQUITY — CONFLICTING EVIDENCE.**—Where the evidence in the trial court is conflicting, but sufficient to sustain the findings and decree, the supreme court will not interfere. *Riley v. Riley*, 290.

6. **EQUITY CANNOT ENFORCE AN EXPRESS TRUST RESTING IN PAROL.**—In a suit to recover from the grantee land conveyed to him by deed absolute in form, on the ground of an alleged parol agreement that it should operate as a mortgage, but where the testimony shows that no agreement ever existed for a reconveyance or restoration to the grantor of the land itself, the conditions of the agreement sworn to by the witnesses being those essential to the creation of an express trust in the realty conveyed, the action must fail, since a trust of that character cannot rest in parol. *Armor v. Spalding*, 302.

7. **INSURANCE CONTRACTS.**—Contracts of insurance like other contracts are to be interpreted according to the language employed by the parties; but courts of equity will relieve against any fraud or deception connected therewith. Where substantial ambiguity occurs in such contracts it may be explained as in other cases. *State Ins. Co. v. Horner*, 391.

8. **LEGAL AND EQUITABLE REMEDIES — ACTION FOR DELIVERY OF TITLE DEEDS.**—Where the principal ground of relief demanded by an action is the delivery of title deeds, muniments of title, or other written instruments, the value of which cannot with reasonable certainty be estimated, or where by reason of the insolvency of the defendants an action at law would not afford a full, adequate and complete remedy, an equitable action may be maintained. *Williams v. Carpenter*, 477.

9. **EQUITABLE INTERVENTION NOT ADMISSIBLE — ACTS OF A PARTY TO A CONTRACT AGAINST WHICH A COURT OF EQUITY CANNOT RELIEVE.**—Where a party has the means of acquiring full information respecting the nature and extent of the obligations he is about to assume in the execution of the contract, and ample time to acquaint himself therewith, in the absence of fraud or imposition by the other party to the contract, a court of equity cannot relieve him against over-generous, hasty and inconsiderate action on his part, however ill-advised and injurious to his interests they may be. *Wier v. Johns*, 493.

10. **NO RELIEF AGAINST ONE'S OWN LACHES.**—A bill to set aside a conveyance of land donated by the plaintiff will not lie in the absence of fraud or mistake. *Ib.*

11. **JURISDICTION — HOW A JUDGMENT MAY BE IMPEACHED.**—A judgment rendered without obtaining jurisdiction of the person may be impeached by a proceeding in equity, or by answer to an action, wherein equitable defenses are allowable. *Wilson v. Hawthorne*, 530.

12. **ALLEGATION OF MERITS.**—An allegation of merits should be made in a complaint or answer denying the validity of a judgment as an earnest of good faith; but such allegation is not essential or traversable. *Ib.*

13. **AN EQUITABLE DEFENSE MAY BE SUFFICIENT AS TO A SINGLE DEFENDANT THOUGH INSUFFICIENT AS TO OTHERS.**—The rigid rule in common-law actions that a joint plea, insufficient as to one defendant, is insufficient as to all, is not applicable to an

EQUITY — Continued.

equitable defense under the Code of Civil Procedure. *Quære*, whether a judgment rendered against several parties may be maintained against those over whom jurisdiction was regularly obtained, when set aside as to others for want of jurisdiction. *Id.*

14. **THE STATUTE OF FRAUDS NOT INVOLVED IN SETTLEMENT OF THE ACCOUNTS OF A MINING PARTNERSHIP.**— When the business of a partnership organized to lease and operate a mine during a limited period for the sole purpose of making a profit through the extracting and marketing ores therefrom has been terminated, in a suit brought by one of the partners to settle the partnership accounts and distribute the partnership profits and assets, no interest in realty is involved. *Meagher v. Reed*, 335.

15. **IMPEACHMENT OF CONTRACT FOR ALLEGED INEQUITABLE PROVISIONS.**— Where one of the stipulations in a contract for the loan of money to be invested in mining property is that the party loaning is to have an equal interest, for all time to come, in the profits derived from the development of the property, the question whether such stipulation should be adjudged void as inequitable and unconscionable is to be determined by a consideration of the situation of the parties at the time of entering into the contract, their intentions, the legal effect of their stipulations, the character of the security to be given for the proposed loan and the risk assumed in making it. *O'Reilly v. Burns*, 7.

ESTATES:

1. **STATUS OF TRUST FUND ON DEATH OF TRUSTEE.**— A trust fund on death of trustee remains such, though intermingled with other moneys, and does not become general assets of the estate of the trustee. *First Nat. Bank v. Hummel*, 259.

2. **LEGAL EFFECT OF A CONVEYANCE SUBJECT TO A CONDITION.**— Where the conveyance of real estate is made subject to a condition for reversion which may never happen, the grantor is not possessed of an estate in reversion, and a conveyance from him in expectancy of such event would not invest his grantee with any interest in the land. *D. & S. F. Ry Co. v. School District*, 327.

ESTOPPEL (see, also, WAIVER):

1. **DEFENSE OF MISREPRESENTATIONS IN SALE OF PROPERTY — ESTOPPEL BY CONDUCT — RATIFICATION OF SALE.**— Where purchasers of mining property enter into possession, and, after finding that they have been deceived by misrepresentations of the seller, fail to either rescind the contract of purchase or affirm it, and bring an action for the deceit, but continue to exercise acts of ownership, they are estopped from setting up the misrepresentations as a defense to an action to enforce the contract. *Butler v. Rockwell*, 125.

2. **WHO IS ESTOPPED TO DENY DE FACTO EXISTENCE OF A CORPORATION DE JURE.**— One who has signed the certificate of incorporation of a mining company so defective in its provisions as to be insufficient to create a corporation *de jure*, and has conveyed property to the company and acted as one of its officers, is estopped from denying its *de facto* existence. *Bates v. Wilson et al.* 140.

3. **WHEN JUDGMENT IN FAVOR OF A LANDLORD AGAINST HIS TENANT DOES NOT ESTOP HEIR OF TENANT TO CLAIM SAME LAND.**— A judgment in ejectment by a landlord against his tenant for a breach of the conditions of his lease will not bar a subsequent action against the landlord by an heir of the tenant to recover the land, on the ground that a patent therefor was issued to the tenant during his tenancy, as in the former action the tenant was estopped to deny his landlord's title. *Arnold v. Woodward*, 164.

ESTOPPEL — Continued.

4. **TRANSFER OF STOCK IN TRADE BY INSOLVENT FIRM — RATIFICATION BY CREDITORS.**—Where an insolvent firm has transferred all its property, taking notes in payment, its creditors, who have not sought to have the sale set aside, but have treated it as legitimate by proceeding against the purchasers by attachment for the money due on the notes, cannot question the *bona fides* of the sale. *Sickman v. Abernathy*, 174.

5. **ESTOPPEL BY CONDUCT.**—Where a defendant corporation, through negligence, placed the plaintiff in a position of danger, it cannot complain that he did not exercise cool presence of mind in his endeavor to escape therefrom. *Mining Co. v. McDonald*, 191.

6. **FORCIBLE ATTEMPT TO ACQUIRE RIGHT OF WAY.**—If a railway company forcibly enters upon land of a citizen who is vested with the exclusive right of possession, and attempts to construct its road-bed over the same, the citizen may procure its expulsion by an action of ejectment, provided he does not acquiesce in the possession so taken, or by affirmative acts, laches or other conduct place himself and the railroad company in such a position as to make it inequitable for him to insist upon a restoration of the possession. *D. & S. F. R. Co. v. School District*, 327.

7. **AN ACTION FOR DAMAGES FOR CAUSING DEATH OF HUSBAND NOT MAINTAINABLE BY WIDOW AFTER SATISFACTION OF ALL DEMANDS.**—Where a widow knowingly executed to the defendant, before bringing her suit for damages against him for having caused the death of her husband, an acknowledgment of satisfaction "in full demands of every name and nature whatsoever from one party to the other," on production of the paper, and evidence of the plaintiff that she knew of her claim at time of signing it, the court properly held that the action could not be maintained. *Guldager v. Rockwell*, 459.

8. **EFFECT OF A DISMISSAL OF A SUIT BY STIPULATION.**—Where plaintiff moved a building for defendant, placing it in position on its new site, elevated on blocks furnished by the plaintiff, on which it was to rest ten days, in which time defendant was to have a permanent foundation placed under it and the blocks released, but failed to comply with his contract, and the plaintiff brought suit for the value of the blocks and for damages for their detention and use, the dismissal of such suit by stipulation of the parties, without a reservation to the plaintiff of the right to sue again, is a bar to another suit for the same cause of action. *Ford v. Roberts*, 291.

9. **ILLEGITIMATE DEFENSE — ONE MADE BY A PARTY NOT ENTITLED THERETO, OR MADE AFTER WAIVER OF THE OBJECTION RELIED ON.**—It is no defense to an action for the delivery of title deeds, after payment and acceptance of the purchase money, that the contract of sale was not in writing, and was therefore void. One to whom the title papers have been intrusted for delivery to the purchaser can in no event interpose such a defense to the action. *Williams v. Carpenter*, 477.

10. **ACTS OF A PARTY AGAINST WHICH A COURT OF EQUITY CANNOT RELIEVE.**—Where a party has the means of acquiring full information respecting the nature and extent of the obligations he is about to assume in the execution of a contract, and ample time to acquaint himself therewith, in the absence of fraud or imposition by the other party to the contract, a court of equity cannot relieve him against over-generous, hasty and inconsiderate actions on his part, however ill-advised and injurious to his interests they may be. *Wier v. Johns*, 493.

EVIDENCE:

1. **BURDEN OF PROOF.**—Where plaintiff's claim for wages as sued for was admitted, defendant was properly required to assume the burden of proving payment. *Lovelock v. Gregg*, 53.

2. **BOOK ENTRIES — WHEN PROPERLY EXCLUDED.**—Where the entries in a book of account were made a week or more after the transactions occurred to which they related, and where the book of account was mutilated by the book-keeper cutting out the leaves on which the account was kept, the book was properly excluded as evidence. *Ib.*

3. **ORAL PROOF OF CONTENTS OF MISSING FILES.**—The proper foundation being laid, the character and contents of the missing files in a cause tried before a justice of the peace may be established by oral evidence. *Conway v. John*, 30.

4. **MUNICIPAL CORPORATION AS GARNISHEE — EVIDENCE IN DISCHARGE OF LIABILITY.**—When an incorporated town is summoned as garnishee on account of salary due one of its officers, the town may show in discharge of its liability that the officer is a collector of its taxes, and, as such, has received money of the town, which he insists upon retaining, equal to the amount of salary due him. It is not to be inferred, however, that the officer has a right to insist upon retaining money under such circumstances; for the right of election to treat money in the hands of a receiver of the public revenue as a simple contract debt or as a trust fund is with the municipality, and not with the collecting officer. *Sauer v. Town of Nevada*, 54.

5. **EFFECT OF CONFLICT OF FACT IN SETTLEMENT OF PLEADINGS.**—The power to strike out sham pleadings is required to be exercised with caution. Under it the court cannot determine the truth or falsity of a plea upon conflicting evidence. *Patrik v. McManus*, 65.

6. **ADMISSIBILITY OF MINER'S LIEN STATEMENT IN EVIDENCE.**—A statement upon which a miner's lien is sought to be based, which clearly expresses an intention to hold and claim a lien, and contains a description of the property complete on its face, and shows the sum total in dollars and cents which the claimant's work amounts to, and states that the same is due, and that no portion of it has been paid, is admissible in evidence against an objection challenging its sufficiency. *Rico R. & M. Co. v. Musgrave*, 79.

7. **WHEN STATEMENT FOR LIEN INCLUDES SEVERAL MINING CLAIMS, HOW NECESSARY FACTS MAY BE ESTABLISHED.**—A statement filed in the recorder's office against several mining claims need not state that said claims are owned, claimed or worked by the same person or persons, so as to be deemed one mine, for the purposes of the miner's lien statute; it is sufficient if such matters are established by proper averment and proof, or by proof alone, when the defect in the pleadings is waived by answering over. *Ib.*

8. **A CONTRACT WITH OWNER OR AGENT OF PROPERTY ESSENTIAL TO A LIEN — BURDEN OF PROOF.**—To entitle a party to such lien there must be a contract, express or implied, with the owner of the property on which the lien is claimed. The burden of proving such contract rests on the party asserting it, and he must ascertain for himself whether the person with whom he contracts is the owner, or has an interest in the land on which he expects to claim a lien. It is sufficient if the contract be with an authorized agent of the owner. *Ib.*

9. **WHEN EVIDENCE TAKEN AT FORMER TRIAL MAY BE USED ON RETRIAL.**—On a retrial, where there has been a loss of witnesses by death or removal from the jurisdiction of the court, evidence taken

EVIDENCE—Continued.

at the former trial and preserved by bill of exceptions, or otherwise correctly preserved, may be resorted to. *Ib.*

10. **EVIDENCE—EXCLUDING MATTERS OF MERE OPINION.**—A statement on the witness stand by the party to whom a contract and judgment had been assigned as collateral security, that he considered the judgment creditor's judgment paid and settled on receipt by himself of the price of the transfers, was properly excluded as being simply his opinion of the legal effect of the transaction. *Moffatt v. Corning*, 104.

11. **EVIDENCE—WHEN TERMS OF ORIGINAL CONTRACT OF HIRING ADMISSIBLE IN SUIT BY AN EMPLOYEE AGAINST A SUCCESSOR IN BUSINESS.**—Where a man in trade hired an assistant at a stipulated *per diem*, and afterwards, as agent of his wife, who succeeded to the property and business, continued to allow and pay him at the same rate for his services; but the wife, on assuming personal supervision, refused to allow and pay him at the same rate for the time then due, claiming that the contract made with the husband was not binding on her, it is proper for the plaintiff to prove the original contract of hiring. *McQuown v. Cavanaugh*, 188.

12. **CHARACTER OF EVIDENCE REQUIRED IN ELECTION CONTEST.** Mere rumors circulated and arguments advanced against particular candidates during political campaigns, however false or malicious, cannot affect the determination of such cases. The contestor must show that by reason of the illegal casting or rejection of votes the result is different from what it would otherwise have been or the proceeding cannot be entertained. *Todd v. Stewart*, 286.

13. **DECREE IN EQUITY—CONFLICTING EVIDENCE.**—Where the evidence in the trial court is conflicting, but sufficient to sustain the findings and decree, the supreme court will not interfere. *Riley v. Riley*, 290.

14. **PROBATE OF WILL—PRESUMPTION AS TO EVIDENCE OF TESTATOR'S LAST DOMICILE.**—A will should first be admitted to probate in the jurisdiction of the testator's last domicile; but in admitting a will to probate the court must be presumed *prima facie* to base its adjudication respecting the last domicile upon sufficient evidence, and the probate and record thereof can only be questioned by some appellate or direct proceeding. *Corrigan v. Jones*, 311.

15. **PRACTICE IN ATTACHMENT OF CHATTELS—EXAMINATION OF WITNESSES BY TRIAL JUDGE AS TO COMPETENCY.**—In an action for the alleged wrongful attachment of a stock of goods, where there is a wide difference of opinion among witnesses as to its value, it is not improper for the trial judge to subject the witnesses to a searching examination as to their competency, to enable the jury to judge of the value of their testimony. *Keith v. Wells*, 321.

16. **EVIDENCE—READING TO THE JURY ENTRIES IN BANK DEPOSIT BOOKS.**—Where bank deposit books have been admitted in evidence without objection, their contents are before the jury for consideration; and it is not prejudicial error for the trial court to permit the bank teller to read their contents to the jury, though he has no personal knowledge as to part of the entries. *Ib.*

17. **PARTICIPATION OF COURT IN EXAMINATION OF A PARTY TESTIFYING IN HIS OWN BEHALF.**—Unless it be shown that a party testifying in his own behalf was actually prejudiced by the participation of the court in his direct and cross-examination, such fact cannot be relied on as error. *Baur v. Beall*, 383.

18. **THE CONSTABLE'S SALE—ADMISSION OF THE RECORDS AND FILES OF THE JUSTICE'S COURT IN JUSTIFICATION.**—The record of a pro-

EVIDENCE—Continued.

ceeding in the court of a justice of the peace, which is properly authenticated and proved, is admissible in evidence, in an action against a constable, to show justification by establishing the judgment, and the awarding of the writs under which the constable acted, and under which he justified. *Ib.*

19. **ATTORNEYS AT LAW—ACTION FOR SERVICES—PLEADINGS AND EVIDENCE.**—In an action by an attorney for his fee, where no issue is raised by the pleadings on the point of plaintiff's right to practice law, evidence that he was not licensed to practice in the state at the time the services were rendered is inadmissible. *Bachman v. O'Reilly*, 433.

20. **HOW THE VALUE OF AN ATTORNEY'S SERVICES MAY BE PROVEN.**—Evidence by attorneys in good standing and in active practice is admissible to prove the value of such services. *Ib.*

21. **CONSTRUCTION OF EXPRESSIONS EMPLOYED IN POLICIES OF INSURANCE.**—The meaning of the phrase "writing the risk," and the items covered by the expression "the expenses of writing the risk," used in a policy of insurance, may be shown by oral evidence; the jury may determine what is meant by and included within each of these expressions; but that body may not pass upon the question whether one embraces the other.

22. While courts have no power to change or modify by construction the expression "the expenses of writing the risk" when thus used, they should require that such expenses be reasonable.

23. Doubtful provisions of insurance policies are to be construed most favorably to the assured.

24. In a provision in a policy that the "insurance may be terminated, at the request of the insured, by repaying the company the customary short rates from the date of this policy, together with the expenses of writing the risk," the "customary short rates" do not include "the expenses of writing the risk."

25. In such a policy "the expenses of writing the risk" includes the commission paid by the company to its agent. *State Ins. Co. v. Horner*, 391.

26. **ACTION ON INSURANCE POLICY—ISSUES AND TESTIMONY.**—In an action upon a policy of insurance in which the pleadings put in issue the making of the application for insurance, the insured is entitled to testify that he did not make or sign it, and to give his version of what actually took place between himself and the agent in reference to the application. *State Ins. Co. v. Taylor*, 499.

27. **ALLEGED VIOLATIONS OF POLICY NOT FATAL TO ITS VALIDITY.**—The claim that the policy has been avoided by a violation of the provision thereof that the house insured is occupied by the owner as a private residence, whereas it was occupied as an inn or boarding-house, is not available as a defense where it appears that the character of the house in this particular was not changed after the insurance was effected; that the company's agent was informed at the time of making the contract that persons were entertained at the house, more or less, and some boarders kept at times, owing to a want of other places of entertainment, and that this use of the property in no way contributed to the loss. *Ib.*

28. **RULE FOR ASCERTAINING VALUE OF INSURED BUILDING DESTROYED BY FIRE.**—In a suit on an insurance policy on a house destroyed by fire, the measure of damages is the value at the time of the loss; and to arrive at that, the original cost, the cost of a like building at the time of the trial, and the difference in value between the house burned and a new one, by reason of a age and use, are all proper subjects of inquiry. *Ib.*

EVIDENCE — Continued.

29. **VERBAL CONTRACT — STATUTE OF FRAUDS.**— A special promise to answer for the debt of another, not in writing, is void under the statute of frauds. Oral evidence of extrinsic facts when admissible, letters, extrinsic facts and circumstances relating to the parties and their actual dealings with each other in reference to matters referred to in writings may be shown by oral evidence, including the previous conduct of a party, inconsistent with the claim relied on at the trial; but mere naked contemporaneous declarations, and the unauthorized statements of third parties, are not admissible. Letters signed by the parties, tending to explain the transaction in litigation, are admissible. *Cross v. Kistler*, 571.

30. **PRACTICE IN SUPREME COURT WHEN FINDING UNSUPPORTED.** Where the evidence does not tend to support the finding of the court below the judgment will be reversed. *Ib.*

31. **WHEN PROOF OF NEGLIGENCE NECESSARY TO A RECOVERY.** A party accepting a note and chattel mortgage in his own name to secure his own claim, as well as the individual claim of another, as an accommodation to the latter, is bound to exercise only ordinary diligence, and is not liable for a failure to realize on the securities without proof of negligence. *Ib.*

32. **ORAL EVIDENCE PERTAINING TO MATTERS REFERRED TO IN WRITTEN CONTRACTS ADMISSIBLE.**— Extrinsic facts relating to the parties and their actual dealings with each other in reference to matters referred to in writings may be shown by oral evidence; but mere naked contemporaneous declarations, and the unauthorized statements of third parties, are not admissible. *Ib.*

33. **LETTERS OF THE PARTIES ADMISSIBLE.**— Letters signed by the parties tending to explain the transaction in litigation are admissible in evidence. *Ib.*

34. **INCONSISTENT CONDUCT OF A PARTY ADMISSIBLE.**— The previous conduct of a party inconsistent with the claim upon which he relied at the trial is admissible in evidence against him. *Ib.*

35. **PROOF NECESSARY TO SUSTAIN ACTION FOR CONVERSION OF A SURPLUS.**— An action brought to recover for an alleged surplus of a stock of goods delivered the defendant on a bill of sale, to be resold by him and the proceeds applied in liquidation of the plaintiff's indebtedness, wherein the proof fails to show the value of the stock so delivered, or that a surplus of money or goods remained after payment of the debt, or that the defendant was guilty of bad faith in the disposal of the stock, cannot be maintained. *Beaton v. Wade*, 4.

36. **EVIDENCE TO ESTABLISH AN EXPRESS TRUST CANNOT REST IN PAROL.**— Where the testimony shows that no agreement ever existed for a reconveyance or restoration to the grantor in a deed absolute, of the land itself, and the conditions of the agreement sworn to by the witnesses being those essential to the creation of an express trust in the realty conveyed, the action must fail, since a trust of that character cannot rest in parol. *Armor v. Spalding*, 303.

37. **A DEED ABSOLUTE MAY BE SHOWN TO BE A MORTGAGE.**— A deed absolute in form may be shown by clear and unequivocal parol proofs to be in effect a mortgage. *Ib.*; *McClure v. Smith*, 297.

38. **MATERIAL AVERMENTS IN ELECTION CONTEST MUST BE PROVEN.**— In a county election contest the statement of the contestor that he is "an elector of the county" is a material averment, and if denied by the answer must be proven or the contest will fail. The fact that other competent evidence is refused does

EVIDENCE—Continued.

not excuse the contestor from proving such averment. *Clanton v. Ryan*, 419.

39. EVIDENCE OF POSTING NOTICES.—In a proceeding requiring notices to be posted in three of the most public places in the precinct, evidence showing that one of such notices was posted on the front door of the court-house, one on the side of the stairs leading to the justice's office, and one on a certain *corral* fence, and that "these places were then regarded, and would now be, three about as public places as could be found in the precinct," shows a compliance with the statute as against a collateral attack upon the proceedings. *Conway v. John*, 30.

40. ACTION FOR DAMAGES FOR CAUSING DEATH OF HUSBAND—PLEA OF ACCORD AND SATISFACTION.—In a suit by a widow for damages for causing the death of her husband, defendant, having pleaded accord and satisfaction, produced a paper signed by the parties, which, after reciting that defendant had bought certain horses and mules of plaintiff, surrendered certain notes of her deceased husband, and paid her certain moneys, states that these are "in full demands of every name and nature whatsoever from one party to the other." Plaintiff testified that at the time of signing the paper she knew she had a claim on account of the death of her husband, and intended to bring suit upon it, but did not mention it then because she did not want to. The court properly directed a verdict for the defendant. *Guldager v. Rockwell*, 459.

EXCEPTIONS AND BILLS OF EXCEPTIONS:

1. BILL OF EXCEPTIONS TO BE AUTHENTICATED BY THE JUDGE WHO TRIES THE CAUSE.—When one district judge tries a cause for another, the judge actually presiding is the one to authenticate the bill of exceptions as to any and all rulings excepted to before him on the trial. *Empire L. & C. Co. v. Engley*, 289.

2. TRIAL BY COURT—MOTION FOR NEW TRIAL—BILL OF EXCEPTIONS.—Where a trial is had to the court and its findings announced, an undetermined motion for a new trial operates to reserve the case and continue the jurisdiction beyond the term for the purpose of disposing of the motion and settling a bill of exceptions. *Stocking v. Morey*, 317.

3. BILL OF EXCEPTIONS—STIPULATIONS OF COUNSEL NOT EQUIVALENT THERETO.—The supreme court cannot review the evidence unless the same is incorporated into the record. The stipulation of counsel that the testimony as taken by the court stenographer shall be the record in the case does not supply the place of a bill of exceptions duly authenticated and certified. *McKenzie v. Ballard*, 426.

EXECUTION:

1. POSSESSION OF MORTGAGED CHATTELS MUST BE TAKEN ON DEFAULT.—After default in payment of a debt secured by a chattel mortgage the mortgagee must take actual possession of the mortgaged property or it will be subject to levy and sale at the suits of creditors of the mortgagor, and to the rights of subsequent purchasers in good faith. A concurrent or joint possession by the mortgagor and mortgagee is not sufficient. *Atchison v. Graham*, 217.

2. SALE OF CHOSE IN ACTION ON EXECUTION.—By statute the mortgagor's interest in land is made subject to execution sale. And the mortgagee, as well as a stranger, may subject this interest to the payment of an independent debt. *Seaman v. Hux*, 536.

EXECUTORS AND ADMINISTRATORS:

1. **ACTIONS AGAINST ESTATE OF DECEASED PERSON — PARTNERSHIP ASSETS TO BE FIRST EXHAUSTED.**— An action for a firm debt cannot be maintained against the estate of a deceased person, in the absence of proof of a final settlement between the surviving partner and the estate, and that the partnership assets are insufficient to pay the debt. *Beaton v. Wade*, 4.

2. **WILLS — THE FIRST PLACE OF PROBATE IS THE TESTATOR'S LAST DOMICILE — PRESUMPTION CONCERNING — HOW THE PROBATE AND RECORD MAY BE QUESTIONED.**— A will should be first admitted to probate in the jurisdiction of the testator's last domicile; but in admitting a will to probate the court must be presumed *prima facie* to base its adjudication respecting the last domicile upon sufficient evidence, and, under such circumstances, the probate and record thereof can only be questioned by some appellate or direct proceeding. *Corrigan v. Jones*, 311.

3. **LETTERS TESTAMENTARY OR OF ADMINISTRATION HAVE NO EXTRATERRITORIAL FORCE.**— The general rule is that letters testamentary or of administration have no extraterritorial force. When such letters have been duly granted in the jurisdiction of deceased's last domicile, they are the principal letters of authority, and those granted in other jurisdictions are ancillary. *Ib.*

4. **HOW A WILL MAY BE PROBATED WHICH WAS FIRST ADMITTED TO PROBATE IN A FOREIGN STATE — LETTERS TESTAMENTARY MAY ISSUE THEREON.**— A will admitted to probate in the court of another state having jurisdiction of such matters is, on the presentation of the duly certified record thereof, entitled to be admitted to probate and record in this state, and letters testamentary or of administration may issue thereon as in other cases. The probate and record, under such circumstances, would seem to be mandatory; but the court is invested with discretion in the matter of issuing letters, but the discretion is not arbitrary. It must be sound and reasonable,— such as will secure the administration of the estate according to the will of the deceased, as well as with due regard to local creditors. *Ib.*

EXEMPTION:

1. **WAIVER OF EXEMPTION RIGHTS.**— Where the debtor was out of the state at the time of the levy, a letter to his creditor asking for a postponement of the case until he could "come down, and fix up everything satisfactory," but making no claim of exemption, was not a waiver of his exemption rights. *Harrington v. Smith*, 876.

2. **ATTACHMENT AND SALE OF EXEMPT PERSONAL PROPERTY.**— When a debtor has property of any kind in excess of the quantity covered by the exemption statute, it is his duty to interpose his claim of exemption prior to the sale, if he has notice of the levy and is in position to do so; but when he has only the amount, kinds and value of property covered by the statute, a levy upon and sale thereof is absolutely illegal, unless the exemption be waived. In such case it is the duty of the officer to set aside the exempt property. *Ib.*

3. **THE STATUTE APPLIES TO MERCHANTS AND SHOP-KEEPERS.**— Section 32, chapter 6C, of the General Statutes, which exempts from levy and sale on execution or attachment the tools, implements, working animals, books and stock in trade, not exceeding \$300 in value, of any mechanic, miner or other person not being the head of a family, used and kept for the purpose of carrying on his trade and business, covers and includes the stock in trade of a merchant or shop-keeper kept for the purpose of sale,

EXEMPTION — Continued.

to the extent specified in the statute, the same as the property of other persons. *Martin v. Bond*, 466.

FORMS: See PLEADING, 14.

FRAUD:

1. **FRAUDULENT ASSIGNMENT OF PROMISSORY NOTE.**— The assignee of a promissory note who pays no consideration therefor and participates in the fraudulent intent of his assignor is not entitled to the immunity of *bona fide* assignees for value, before due, of commercial paper. *Hamill v. First Nat. Bank*, 1.

2. **POSSESSION OF MORTGAGED CHATTELS AFTER DEFAULT.**— Suffering mortgaged property to remain in the possession of the mortgagor after a default in payment is a fraud *per se* and renders the mortgage void as to creditors both under the chattel-mortgage act and the statute of frauds. *Atchison v. Graham*, 217.

3. **STATUTE OF FRAUDS — EXPRESS TRUSTS IN REALTY MUST BE IN WRITING — A DEED ABSOLUTE MAY BE SHOWN TO BE A MORTGAGE — ACKNOWLEDGMENT.**— While it is essential to the creation of an express trust, in view of the statute of frauds, that it be in writing, yet a deed of realty absolute in form may be shown by clear and unequivocal parol proofs to be in effect a mortgage. An unacknowledged deed may be effectual in passing title to realty. *Armor v. Spalding*, 302.

4. **VERBAL PROMISE TO ANSWER FOR DEBT OF ANOTHER — STATUTE OF FRAUDS.**— A special promise to answer for the debt of another, not in writing, is void under the statute of frauds. *Cross v. Kistler*, 571.

5. **CONTRACT FOR SALE OF CHATTELS TO BE SUBSEQUENTLY DELIVERED NOT A FRAUDULENT CONVEYANCE.**— A contract under which a firm of merchants are to furnish supplies and moneys to the owners of a mine, and in return to receive ore as mined, is not a present absolute sale of the ore, though it contains the words "sells, assigns and transfers;" and it is therefore not within the provisions of the General Statutes of Colorado, chapter 43, section 14, declaring that every sale of chattels, unless accompanied by an immediate delivery and a continued change of possession, shall be conclusively presumed fraudulent as against creditors of the vendor. *Finding v. Hartman*, 596.

GARNISHMENT:

1. **GARNISHMENT — LEGAL STATUS OF GARNISHEE.**— Under no circumstances shall a garnishee, by the operation of the proceedings against him, be placed in any worse condition than he would be in if the defendant's claim against him were enforced by the defendant himself. *Sauer v. Town of Nevada*, 54.

2. **MUNICIPAL CORPORATION AS GARNISHEE — WHAT MAY BE SHOWN IN DISCHARGE OF LIABILITY.**— When an incorporated town is summoned as garnishee on account of salary due one of its officers, the town may show in discharge of its liability that the officer is a collector of its taxes, and, as such, has received money of the town, which he insists upon retaining, equal to the amount of salary due him. It is not to be inferred, however, that the officer has a right to insist upon retaining money under such circumstances; for the right of election to treat money in the hands of a receiver of the public revenue as a simple contract debt or as a trust fund is with the municipality, and not with the collecting officer. *Ib.*

3. **BONA FIDE PURCHASERS NOT LIABLE TO GARNISHMENT AFTER PAYMENT OF PURCHASE MONEY.**— The right of a creditor to gar-

GARNISHMENT — Continued.

nish property, effects, etc., of a debtor, in the possession and charge, or under the control, of a third person, under General Statutes, section 1554, does not apply as against purchasers, without fraud, of the property of an insolvent partnership, who have paid the purchase money. *Sickman v. Abernathy*, 174.

4. **ASSIGNMENT OF CLAIM AGAINST A COUNTY — GARNISHMENT.** — Where an individual who is working for a county, under a contract, gives to the county clerk thereof an order to deliver all warrants issued by the county commissioners to him to one J., as collateral security for a note attached to the order, the acceptance of such order by the written indorsement thereon of the county clerk perfects the assignment, and places the assignor's claim against the county beyond the reach of garnishment. *Lewis v. Commissioners*, 371.

GOODS AND CHATTELS: See **PERSONAL PROPERTY.**

HABEAS CORPUS: See **CRIMINAL LAW**, 2, 3.

HIGHWAYS: See **STREETS AND HIGHWAYS.**

INSOLVENT DEBTORS: See **SALES**, 1, 2.

INSURANCE:

1. **CONTRACTS OF INSURANCE — EQUITABLE RELIEF AGAINST FRAUDULENT PRACTICES — CONSTRUCTION OF WORDS AND PHRASES.** Contracts of insurance, like other contracts, are to be interpreted according to the language employed by the parties. *State Ins. Co. v. Horner*, 391.

2. But courts of equity will relieve against such contracts where fraud or deception supervenes, and substantial ambiguity therein may be explained as in other cases. *Ib.*

3. The meaning of the phrase "writing the risk," and the items covered by the expression "the expenses of writing the risk," used in a policy of insurance, may be shown by oral evidence; the jury may determine what is meant by and included within each of these expressions; but that body may not pass upon the question whether one embraces the other. *Ib.*

4. While courts have no power to change or modify by construction the expression, "the expenses of writing the risk," when thus used, they should require that such expenses be reasonable. *Ib.*

5. Doubtful provisions of insurance policies are to be construed most favorably to the assured. *Ib.*

6. In a provision in a policy that the "insurance may be terminated, at the request of the insured, by repaying the company the customary short rates from the date of this policy, together with the expenses of writing the risk," the "customary short rates" do not include "the expenses of writing the risk." *Ib.*

7. In such a policy "the expenses of writing the risk" includes the commission paid by the company to its agent. *Ib.*

8. **ACTION ON FIRE INSURANCE POLICY — THE INSURED NOT PREJUDICED BY FALSE ANSWERS IN HIS APPLICATION MADE BY AN AGENT OF THE INSURANCE COMPANY WITHOUT HIS KNOWLEDGE.** — A fire insurance policy indorsed with a copy of an application purporting to have been signed by the insured, and referring to it as made by him, is not avoided by untrue answers, which he did not give, contained in the application, written by an agent with power to solicit insurance, receive premiums and deliver policies, and by him signed in the name, but without the knowledge or consent, of the insured. *State Ins. Co. v. Taylor*, 499.

INSURANCE — Continued.

9. **THE RULES GOVERNING PRINCIPAL AND AGENT APPLICABLE IN THE CONSTRUCTION OF INSURANCE CONTRACTS.**— Contracts of insurance are to be considered and construed by the same rules of law and of interpretation as other contracts, in order to carry out the intention of both parties. Consequently the employment by an insurance company of an agent to solicit, receive and forward to the company applications for insurance, to receive and forward policies, and to collect the premiums, makes him the agent of the company for the performance of these duties; and any misstatements, errors or omissions resulting from his fraud, neglect or carelessness are chargeable to the insurer, and not to the insured. *Ib.*

10. **DEFENSE TO ACTION ON POLICY, ALLEGING VIOLATIONS OF ITS PROVISIONS BY THE INSURED — FACTS AND CIRCUMSTANCES MAY BE SHOWN IN REBUTTAL.**— The claim that the policy has been avoided by a violation of the provision thereof that the house insured is occupied by the owner as a private residence, whereas it was occupied as an inn or boarding-house, is not available as a defense where it appears that the character of the house in this particular was not changed after the insurance was effected; that the company's agent was informed at the time of making the contract that persons were entertained at the house, more or less, and some boarders kept at times, owing to a want of other places of entertainment, and that this use of the property in no way contributed to the loss. *Ib.*

11. **CONSTRUCTION OF A PROVISION OF THE POLICY AGAINST INCREASING THE HAZARD.**— A provision of the policy, that it shall be void if the hazard is increased without the consent of the company in writing, applies only to the premises of the insured and property under his control. The language cannot be extended to property not under his control, nor to the acts of contiguous owners. So, likewise, the statement made at the time of the application for insurance, that a contiguous building, not owned or controlled by the applicant, was vacant, is to be regarded as a statement of its condition at that time, not as a guaranty that it would remain in that condition. *Ib.*

12. **MEASURE OF DAMAGES — RULE FOR ASCERTAINING THE VALUE OF AN INSURED BUILDING WHICH HAS BEEN DESTROYED BY FIRE.**— In a suit, on an insurance policy on a house destroyed by fire, the measure of damages is the value at the time of the loss; and, to arrive at that, the original cost, the cost of a like building at the time of the trial, and the difference in value between the house burned and a new one, by reason of age and use, are all proper subjects of inquiry. *Ib.*

13. **POWER OF MUNICIPAL CORPORATIONS TO LICENSE.**— The authority of municipal corporations to grant licenses for occupations carried on within their limits exists by force of the statute alone, and they cannot legally exact license fees from those engaged in business pursuits not included or covered by the statute. *Bernheimer v. City of Leadville*, 518.

14. **AN INSURANCE AGENT IS NOT AN INSURANCE BROKER.**— An insurance agent employed by one company to represent it in soliciting applications for insurance, with authority to write and issue policies, is not an insurance broker, nor subject to a city ordinance requiring insurance brokers to pay a license fee. *Ib.*

IRRIGATION:

1. **IRRIGATING DITCHES — INEFFECTUAL ORDER TO BUILD "SLUICES" ON DISSOLVING INJUNCTION AGAINST THE CONSTRUCTION OF A DITCH.**— A plaintiff had obtained an injunction restraining

IRRIGATION — Continued.

defendant from constructing an irrigating ditch through the land of the former. On final hearing the injunction was dissolved and the cause dismissed. There was nothing in the pleadings about sluices. *Held*, that an order of court requiring defendant to build sluices for irrigating water wherever necessary was ineffectual for any purpose on account of its uncertainty. *McKenzie v. Ballard*, 426.

2. **DAMAGE BY ESCAPING WATER FROM IRRIGATING DITCH — STATUTORY LIABILITY OF DITCH OWNERS.**— Where owners of an irrigating ditch recklessly attempted to convey a volume of water through it far beyond the reasonable capacity of the ditch to safely carry, and in so doing knowingly caused the ditch to overflow its banks, thereby flooding the land of an adjacent proprietor, and destroying his fruit trees and vines growing thereon, they became liable to respond in damages under General Statutes, sections 312, 1728, 1733. *Greeley Irrigating Co. v. House*, 549.

JOINT TENANTS AND TENANTS IN COMMON:

1. **NECESSARY PARTIES IN PARTITION.**— In proceeding under the statute for partition it is only necessary, at least in the first instance, to make those interested in the property as joint tenants, tenants in common or coparcenary parties to the action. An answer which avers that a lease had been granted "prior to the commencement of the suit," and that the lessees "have been in possession," etc., without disclosing the terms, duration or continued existence of the lease, is insufficient to require the supposed lessees to be made parties. *Jordan v. McNulty*, 280.

2. **CONSENT OF CO-TENANTS NECESSARY TO IMPROVEMENT OF THE JOINT PROPERTY AT EXPENSE OF ALL.**— The law does not invest one tenant in common with authority to improve or develop real property at the expense of his co-tenants, without their authority or consent. *Rico R. & M. Co. v. Musgrave*, 79.

JUDGES: See COURTS.**JUDGMENTS AND DECREES:**

1. **VOID AND VOIDABLE JUDGMENTS.**— As a rule, a judgment of a court of general jurisdiction is void in no case except when it appears from the record itself that the court, in pronouncing it, acted without jurisdiction. *Great West. M. Co. v. W. of A. M. Co.* 90.

2. **JURISDICTION — HOW A JUDGMENT MAY BE IMPEACHED.**— A judgment rendered without maintaining jurisdiction of the person may be impeached by a proceeding in equity, or by answer to an action wherein equitable defenses are allowable. *Wilson v. Hawthorne*, 530.

3. **UNDER CODE PRACTICE A JOINT EQUITABLE DEFENSE MAY BE SUFFICIENT AS TO ONE DEFENDANT THOUGH INSUFFICIENT AS TO OTHERS.**— The rigid rule in common-law actions that a joint plea insufficient as to one defendant is insufficient as to all is not applicable to an equitable defense, under the Colorado Code of Procedure. *Quare*, whether a judgment rendered against several parties may be maintained against those over whom jurisdiction was regularly obtained, when set aside as to others for want of jurisdiction. *Ib.*

4. **INEFFECTUAL ORDER TO BUILD "SLUICES" ON DISSOLVING INJUNCTION AGAINST THE CONSTRUCTION OF A DITCH.**— A plaintiff had obtained an injunction restraining defendant from constructing an irrigating ditch through the land of the former. On final hearing the injunction was dissolved and the cause dismissed. There was nothing in the pleadings about sluices. *Held*, that an

JUDGMENTS AND DECREES — Continued.

order of court requiring defendant to build sluices for irrigating water wherever necessary was ineffectual for any purpose on account of its uncertainty. *McKenzie v. Ballard*, 426.

5. **PERSONAL JUDGMENT IN MECHANIC'S LIEN PROCEEDING.**— Under the act of 1883 a personal judgment may be rendered for the amount found due, in a mechanic's lien proceeding, though the right to a lien be not sustained. *Cannon and Dounce v. Williams*, 21.

6. **APPEAL — OBJECTIONS NOT RAISED BELOW.**— When there is sufficient legal evidence to support the judgment it cannot be disturbed upon appeal because joint and several demands were improperly commingled at the trial, no objection for this reason having been interposed. *Ayres et al. v. Shields*, 475.

JUDICIAL SALE: See SALES, 4.

JURISDICTION:

1. **EXERCISE OF ORIGINAL JURISDICTION BY SUPREME COURT.**— It is the settled practice of the supreme court not to exercise its original jurisdiction except in cases *publici juris*, or in cases where it is shown that a refusal to take jurisdiction would practically amount to a denial of justice. *In re Rogers*, 18.

2. **WRITS OF CERTIORARI LIE FROM DISTRICT TO COUNTY COURTS.**— Compared with the district courts, the county courts are, in point of jurisdiction, inferior to, and their judgments are subject to review by writs of *certiorari* from, the district courts, as provided by chapter 28 of the Civil Code. *Ib.*

3. **JURISDICTION OF COUNTY COURTS IN ELECTION CONTESTS.**— The statements required by the statute are necessary to give the courts jurisdiction, and where no effort is made by the contestor to comply with the requirements of the act in this regard, and a plea to the jurisdiction of the court is interposed by the contestee, setting up said defect, the court is without jurisdiction to proceed with the trial upon the merits. The statute furnishes a complete system of procedure, and before the contestor can legally invoke the jurisdiction of the court he must state the facts required to bring his case within the purview of the statute. *Schwarz v. County Court*, 44.

4. **APPEAL FROM POLICE MAGISTRATE TO DISTRICT COURT.**— Originally the charter of defendant provided for the election of "one justice of the peace to be denominated 'police judge,' for the city of Central." By subsequent amendment the language was so changed as simply to require the election of "one police judge." The city charter further contained the following provision: "Appeals shall be allowed from decisions in all cases arising under the provisions of this act, or any ordinance passed in pursuance thereto, to the district court; and every such appeal shall be granted in the same manner, and with like effect, as appeals are taken from and granted by justices of the peace under the laws of this territory." Afterwards the course of appeal from justices of the peace to the district court was changed to the county court. *Held*, notwithstanding, that an appeal would lie from the police judge to the district court. *Huer v. City of Central*, 71.

5. **ERROR TO DISMISS THE "CAUSE" WHEN PENDING ON APPEAL.** On such an appeal, irrespective of the question of jurisdiction, the district court was not authorized to dismiss the cause. *Ib.*

6. **VOID AND VOIDABLE JUDGMENTS.**— As a rule a judgment of a court of general jurisdiction is void in no case except when it appears from the record itself that the court in pronouncing it acted without jurisdiction. *Great West. M. Co. v. W. of A. M. Co.* 90.

JURISDICTION — Continued.

7. **CONTEMPT OF COURT — WHEN NECESSARY TO THE JURISDICTION THAT AN AFFIDAVIT BE PRESENTED.**— When it is manifest from the course of the proceeding that the language of a petition for a change of venue on the ground of the alleged prejudice of the presiding judge is not a contempt *per se*, but only a constructive contempt, if any, the court is without jurisdiction to order a warrant of attachment to issue against the offender unless an affidavit be presented containing a statement of the facts constituting the contempt. The unsworn report of a committee appointed by the court to inquire into the matters alleged, itself unsworn, does not perform the office of an affidavit. *Thomas v. People*, 254.

8. **JUDGE'S AUTHORITY PRESUMED.**— When a district judge holds a term of court outside his own district, his authority so to do, and to try the causes pending in such court, will be presumed unless the contrary appears. *Empire L. & C. Co. v. Engley*, 239.

9. **BILL OF EXCEPTIONS TO BE AUTHENTICATED BY THE JUDGE WHO TRIES THE CAUSE.**— When one district judge tries a cause for another, the judge actually presiding is the proper one to authenticate the bill of exceptions as to any and all rulings excepted to before him on the trial. *Ib.*

10. **TRIAL BY COURT — MOTION FOR A NEW TRIAL — BILL OF EXCEPTIONS.**— Where a trial is had to the court and its findings announced, an undetermined motion for a new trial operates to reserve the case and continue the jurisdiction beyond the term for the purpose of disposing of the motion and settling a bill of exceptions. *Stocking v. Morey*, 317.

11. **JURISDICTION — IMPEACHING JUDGMENT FOR WANT OF.**— A judgment rendered without obtaining jurisdiction of the person may be impeached by a proceeding in equity, or by an answer to an action wherein equitable defenses are allowed. *Wilson v. Hawthorne*, 530.

12. **JOINING IN ERROR WILL NOT ALWAYS CONFER JURISDICTION.**— When the judgment sought to be appealed from is not appealable, consent, by joining in error, will not secure the appeal. *Crane v. Farmer*, 294.

JURY: See PRACTICE IN CIVIL ACTIONS, 10, 62, 64.

JUSTICES OF THE PEACE:

1. **ATTACHMENTS BEFORE JUSTICES OF THE PEACE.**— Under the act of 1879, in relation to attachments before justices of the peace, requiring notices in certain instances to be posted in three of the most public places within the precinct, evidence showing that such notices were posted in three certain places, and that "these places were then regarded, and would now be, three about as public places as could be found in the precinct," shows a sufficient compliance with the statute, as against a collateral attack upon the proceedings. *Conway v. John*, 80.

2. **ADMISSION IN EVIDENCE OF RECORD OF JUSTICE'S COURT.**— The record of a proceeding in a justice's court, properly authenticated and proved, is admissible in evidence in justification of an officer's official acts under the judgment. *Baur v. Beall*, 383.

LACHES:

1. **FORFEITURE OF EQUITIES.**— Courts of equity will only grant relief in case the application therefor is made without unreasonable delay. The strongest equity may be forfeited by laches, or abandoned by acquiescence. *Great West. Min. Co. v. W. of A. Min. Co.* 90.

2. **FLUCTUATING CHARACTER OF PROPERTY TO BE CONSIDERED IN DETERMINING QUESTION OF LACHES.**— Where the subject-matter

LACHES — Continued.

of controversy is the right to unpatented mining property, the uncertain and fluctuating character of the property will be considered in determining the question of laches. *Ib.*

3. **RIGHT OF ACTION MAY BE LOST THROUGH LACHES.**—If a railroad company enter without right on the land of a citizen vested with the exclusive right of possession, and attempt to construct its road-bed over the same, the citizen may procure its expulsion by an action of ejectment, provided he does not acquiesce in the possession so taken, or, by affirmative acts, laches, or other conduct, place himself and the railroad company in such a position as to make it inequitable for him to insist upon a restoration of the possession. Conduct of the character mentioned would limit his recovery to the value of the land taken. *D. & S. F. Ry Co. v. School District*, 327.

4. **EQUITY CANNOT RELIEVE AGAINST ONE'S OWN LACHES.**—A bill to set aside a conveyance of land donated will not lie in the absence of fraud or mistake. *Wier v. Johns*, 493.

LANDLORD AND TENANT:

1. **A JUDGMENT IN FAVOR OF A LANDLORD FOR POSSESSION NO BAR TO HEIR OF TENANT IN ACTION FOR SAME LAND.**—A judgment in ejectment by a landlord against his tenant for breach of the conditions of the lease will not bar a subsequent action against the landlord by an heir of the tenant to recover the land on the ground that a patent therefor was issued to the tenant during his tenancy, as in the former action the tenant was estopped to deny his landlord's title. *Arnold v. Woodward*, 164.

2. **THE POSSESSION OF THE LANDLORD RECOGNIZED BY THE INSTITUTION OF SUIT BY THE HEIR.**—The bringing of the action by the heir of the tenant is a sufficient recognition that the relation of landlord and tenant had been terminated, so as to entitle the heir to sue for possession under the patent, where the landlord was, and had been for years, in possession under the judgment in the former action. *Ib.*

3. **A VALID LEASE NO DEFENSE TO AN ACTION BY A TENANT AGAINST HIS LANDLORD UPON A DIFFERENT CAUSE OF ACTION.**—It is not a valid defense to an action for services, and for moneys expended for use of the defendant, that plaintiff held a lease of a tract of land from defendant, on which he grazed a large number of animals without paying anything for the privilege, when the lease itself shows that it was given in consideration that the lessee would construct and maintain fences and irrigating ditches, plant trees, erect certain buildings, pay taxes and generally keep the premises in good repair. The lease shows ample consideration for the use of the land, and, in the absence of some default on part of the lessee, is no defense to an action upon a wholly different agreement. *Gilpin v. Adams*, 512.

LEGISLATURE AND LEGISLATION:

1. **CONSTITUTIONAL LAW — INCORPORATION OF CITY BY SPECIAL CHARTER BEFORE THE CONSTITUTION.**—Where, before the adoption of the state constitution, a city was incorporated under a special charter, and no abandonment of this charter, and re-incorporation under the general laws relating to towns and cities, has taken place, the original charter, and amendments thereto, are not unconstitutional on the ground of special or local legislation; and, unless inconsistent with the constitution, they may stand. *Huer v. City of Central*, 71.

LEGISLATURE AND LEGISLATION — *Continued.*

2. CONSTRUCTION OF MINER'S LIEN STATUTE.— The legislation of this state upon the subject of mechanics' and miners' liens should receive a liberal construction. *Rico R. & M. Co. v. Musgrave*, 79.

3. MANDATORY REQUIREMENT CONCERNING TITLES OF BILLS.— The constitutional inhibition against the passage of bills containing matters not embraced in the title is mandatory; but it should be liberally construed, so as to avert the evils against which it is aimed, and at the same time avoid unnecessarily obstructing legislation. *In re Breene*, 401.

4. OBJECT OF CONSTITUTIONAL MANDATE.— The primary purpose of this constitutional provision is to avoid surprise and fraud upon the legislators and people in the enactment of laws; but a further important end is attained by avoiding surprise to those over whom the laws become operative. *Ib.*

5. LIMITS OF LEGISLATIVE POWER RESPECTING TITLES OF BILLS. The general assembly may within reason make the title of a bill as comprehensive as it chooses; but when it elects to limit the title to a particular subdivision of some general subject, the right to embody in the bill matters pertaining to other subdivisions of such subject is relinquished. *Ib.*

LETTERS TESTAMENTARY: See WILLS, 1-3.

LIENS:

1. MECHANIC'S-LIEN STATUTES — CONSTRUCTION AND REQUIREMENTS.— Mechanic's-lien statutes in this state being equitable in purpose and remedial in nature are to receive a liberal construction by the courts. But there must be a substantial compliance with all material requirements thereof. *Cannon and Dounce v. Williams*, 21.

2. LIEN NOT DESTROYED BY HARMLESS MISTAKE OF CLAIMANT.— Where the lien-claimant, acting in good faith, by mistake includes an item for which he is not entitled to a lien, such mistake does not, of itself, destroy the lien. *Ib.*

3. ABSTRACT OF INDEBTEDNESS AN ESSENTIAL REQUIREMENT.— Where the statute requires "an abstract of indebtedness showing the whole amount of debt, the whole amount of credit, and the balance due or to become due," the mere statement of the balance due is not a compliance therewith. *Ib.*

4. ERRORS, WHEN TO BE OVERLOOKED.— When there has been a substantial compliance with the statute, mistakes that do not tend to deceive parties interested may be overlooked. *Ib.*

5. PERSONAL JUDGMENT.— Under the act of 1883 a personal judgment may be rendered for the amount found due, though the right to a lien be not sustained. *Ib.*

6. TITLE BOND DESIGNED TO OPERATE AS A LIEN.— A title bond designed by the maker to operate as a lien upon the premises therein described, but defective as to statements, may be reformed so as to express the meaning of the parties, and enforced in accordance with their intention. *Smith v. Brunk*, 75.

7. MINER'S LIEN — CONSTRUCTION OF STATUTE — A CONTRACT WITH THE OWNER OF THE PROPERTY OR HIS AGENT ESSENTIAL.— The statute is to be liberally construed, but to entitle a party to a lien there must be a contract, express or implied, with the owner of the property, or his duly authorized agent, on which the lien is claimed. *Rico R. & M. Co. v. Musgrave*, 79.

8. REQUISITES OF FILED STATEMENT CLAIMING LIEN — MAY INCLUDE SEVERAL MINING CLAIMS — DEFECTS SUPPLIED BY PROOF.— The filed statement should clearly express an intention to hold

LIENS — Continued.

and claim a lien, showing the sum total in dollars and cents which the claimant's work amounts to, stating that the same is due and unpaid, and containing a complete description of the property on which the lien is claimed. If the statement be filed against several mining claims, it need not state that they are owned, claimed or worked by the same person or persons, so as to be deemed one mine, it being sufficient if such necessary matters are established by proof. *Ib.*

9. CREDITOR'S LIEN ONLY EXISTS WHEN PROPERTY IS IN CUSTODIA LEGIS.—No creditor's lien can attach to the partnership assets of an insolvent firm until they have been brought into the custody of the law by the interposition of the court. *Sickman v. Abernathy*, 174.

10. CONVEYANCES — DEED ABSOLUTE TO OPERATE AS A MORTGAGE.—A deed absolute in form, intended to operate as a mortgage, if given in good faith to secure an actual indebtedness, is not constructively fraudulent as to the grantor's other creditors. *McClure v. Smith*, 297.

11. BONA FIDE LIEN VALID, THOUGH IN FORM FRAUDULENT.—This method of creating an incumbrance is a conspicuous badge of fraud as to existing creditors, but the *bona fides* of the transaction may be shown by collateral proofs. *Ib.*

12. LIEN OF ATTACHMENT NOT DESTROYED BY RELEASE OF PROPERTY UPON A FORTHCOMING BOND.—Under our statute the lien of an attachment is not destroyed by the delivery of the attached property to the defendant upon the execution of a forthcoming bond. *Stevenson v. Palmer*, 565.

13. CONSTRUCTIVE NOTICE OF MORTGAGE LIEN.—The recording of a mortgage, regular in form and correctly describing the property incumbered, operates as constructive notice to third persons of the lien created thereby. *Seaman v. Hax*, 536.

LIMITATION OF ACTIONS:

1. STATUTE OF LIMITATIONS SUPERIOR TO COURTS OF EQUITY.—The statute of limitations fixes a limit beyond which the courts cannot extend the time, but within this limit the peculiar doctrine of courts of equity will prevail. *Great West. M. Co. v. W. of A. M. Co.* 90.

2. THE STATUTE IS PLEADABLE TO ANY ONE OF SEVERAL DISTINCT CAUSES OF ACTION.—The statute of limitations may be pleaded to each or all of the several items joined in a single count of a complaint, constituting distinct causes of action. *Gilpin v. Adams*, 512.

LOCAL OR SPECIAL LEGISLATION: See LEGISLATURE AND LEGISLATION, 1.**MANDAMUS:**

1. WHEN WRIT OF MANDAMUS WILL LIE TO SUBORDINATE COURT, AND EXTENT OF ITS FUNCTIONS.—The writ of *mandamus* may be used to command a subordinate court to proceed to judgment; but when the act to be done is of a judicial or discretionary character, the kind of order or judgment to be rendered cannot be thus controlled or directed. The writ cannot properly usurp the functions of a writ of error, or take the place of an appeal; nor will it lie against a subordinate court unless it be clearly shown that such court has refused to perform some manifest duty. *People ex rel. v. Rucker*, 396.

2. WHEN TWO OR MORE DISTRICT JUDGES MAY ACT TOGETHER.—In this state two or more district judges cannot lawfully sit and

MANDAMUS — Continued.

act together as a district court except as they sit in bank for the purposes specified in the act of April 2, 1887. *Ib.*

MASTER AND SERVANT:

ORIGINAL CONTRACT FOR WAGES PROVABLE AGAINST A SUCCESSOR OF EMPLOYER.— Where a man in trade hired an assistant at a stipulated *per diem*, and afterwards, as agent of his wife, who succeeded to the property and business, continued to allow and pay him at the same rate for his services, in an action by the employee for a balance remaining due at the time the wife assumed personal supervision, and refused to allow him the rate so agreed upon, the plaintiff may prove the original contract of hiring. *McQuown v. Cavanaugh*, 188.

MEASURE OF DAMAGES: See **DAMAGES**, 1, 2.

MECHANIC'S AND MINER'S LIEN: See **LIENS**, 1-4, 7, 8.

MERGER:

CLAIMS AND UNADJUSTED EQUITIES OF CONTENDING PARTIES MERGED IN A PURCHASE.— Where claims, counter-claims and unadjusted equities exist or are asserted by two parties, one against the other, and pending the contention both parties by separate instruments convey and assign to a third person all their rights of property and claims of every nature pertaining to the subject-matters in dispute, all titles and claims of the parties are thereby merged in the purchaser. *O'Reilly v. Burns*, 7.

MINES AND MINING:

1. **THE FLUCTUATING CHARACTER OF PROPERTY TO BE CONSIDERED IN DETERMINING QUESTION OF LACHES.**— The uncertain and fluctuating character of unpatented mining claims will be considered in determining the question of laches. *Great West. M. Co. v. W. of A. M. Co.* 90.

2. **NEGLIGENCE OF MINING COMPANY — RIGHT OF EMPLOYEE TO RECOVER DAMAGES FOR INJURIES OCCASIONED THEREBY.**— Where deep mining is prosecuted by a company through an incline, extending from the surface several hundred feet into the earth, by means of cars run upon iron rails laid therein, and it is an established rule of the company that a signal called a "tally" shall be sounded at a certain hour in the evening, when the cars should cease running and the miners have the right of way of the incline for seven minutes to reach the surface, it is negligence on the part of the company to permit a car to go down the incline after the signal is sounded, and a miner injured thereby is entitled to recover damages. *Mining Co. v. McDonald*, 191.

3. **ESTOPPEL BY CONDUCT.**— Defendant, through its negligence, having put plaintiff in a position of danger, could not complain that he did not exercise cool presence of mind in his endeavor to escape therefrom. *Ib.*

4. **MINING COPARTNERSHIP — STATUTE OF FRAUDS NOT INVOLVED IN ACTION FOR SETTLEMENT OF ACCOUNTS AND DISTRIBUTION OF ASSETS.**— When the business of a partnership, organized to lease and operate a mine during a limited period for the sole purpose of making a profit through the extracting and marketing of ores therefrom, has been terminated in a suit brought by one of the partners to settle the partnership accounts and distribute the partnership profits and other assets, no interest in realty is involved. In such case the right to a settlement and distribution in no way

MINES AND MINING — Continued.

depends upon the legal *status* of realty under the statute of frauds. *Meagher v. Reed*, 335.

5. **PURCHASE AND SALE OF ORES AS MINED VESTS TITLE ON DELIVERY.**— Under a contract with the owners of a mine to furnish them supplies and money, and in return to receive the ore as it is mined, the title to the ore vests in the purchaser on delivery thereof, and a creditor of the mine-owners thereafter attaching the ores delivered takes nothing by his levy. *Finding v. Hartman*, 596.

MISTAKE (see, also, AMENDMENT):

1. **CORRECTION OF CLERICAL ERRORS.**— A mere clerical mistake in preparing a tax deed may be corrected. *Smith v. Griffin*, 429.

2. **REFORMING INSTRUMENTS TO EXPRESS INTENTION OF MAKERS.**— Instruments in writing relating to real estate, which through mistake or fraud fail to express the intention of the parties thereto, may be reformed, as between the makers, and subsequent purchasers with notice of the error, so as to express the intention of the parties. *Smith v. Brunk*, 75.

MORTGAGE:

1. **CONVEYANCES — DEED ABSOLUTE TO OPERATE AS A MORTGAGE.**— A deed absolute in form, intended to operate as a mortgage, if given in good faith to secure an actual indebtedness, is not constructively fraudulent as to the grantor's other creditors. *McClure v. Smith*, 297.

2. **BONA FIDE LIEN VALID, THOUGH IN FORM FRAUDULENT.**— This method of creating an incumbrance is a conspicuous badge of fraud as to existing creditors, but the *bona fides* of the transaction may be shown by collateral proofs. *Ib.*

3. **SAME.**— A deed absolute in form may be shown by clear and unequivocal parol proofs to be in effect a mortgage. *Armor v. Spalding*, 302.

4. **SALE OF CHOSE IN ACTION ON EXECUTION.**— By statute the mortgagor's interest in land is made subject to execution sale. And the mortgagee, as well as a stranger, may subject this interest to the payment of an independent debt. *Seaman v. Haz*, 536.

5. **CONSTRUCTIVE NOTICE OF MORTGAGE LIEN.**— The recording of a mortgage, regular in form and correctly describing the property incumbered, operates as constructive notice to third persons of the lien created thereby. *Ib.*

MUNICIPAL CORPORATIONS:

1. **GARNISHMENT — EVIDENCE IN DISCHARGE OF LIABILITY.**— When an incorporated town is summoned as garnishee on account of salary due one of its officers the town may show in discharge of its liability that the officer is a collector of its taxes, and as such has received money of the town, which he insists upon retaining, equal to the amount of salary due him. It is not to be inferred, however, that the officer has a right to insist upon retaining money under such circumstances; for the right of election to treat money in the hands of a receiver of the public revenue as a simple contract debt, or as a trust fund, is with the municipality and not with the collecting officer. *Sauer v. Town of Nevada*, 54.

2. **CONSTITUTIONAL LAW — INCORPORATION OF CITIES AND TOWNS.**— Where a city was incorporated under a special charter before the adoption of the state constitution, and the charter and its amendments are not inconsistent with the constitution, and there has been no abandonment, they remain valid. *Huer v. City of Central*, 71.

MUNICIPAL CORPORATIONS—Continued.

3. **APPEALS FROM POLICE MAGISTRATES.**— Under the charter of the city of Central an appeal lies from a judgment of the police magistrate to the district court, but it is to be granted in the same manner and prosecuted with the same effect as appeals under the present laws from justices of the peace to the county court are granted and prosecuted. *Ib.*

4. **AUTHORITY OF CITY COUNCIL OF DENVER TO LICENSE TIPPLING-HOUSES SUBJECT TO CONDITIONS.**— The authority of the city council of the city of Denver to license, tax and regulate tippling-houses, dram-shops, etc., is subject to the following, among other, conditions: (1) That the license rate to be charged shall not be less than certain minimum fees specified by the statute; (2) that the power granted shall only be exercised subject to the general law of the state regulating the manner of conducting the business by the licensee. *Heinssen v. State*, 228.

5. **KEEPING OPEN TIPPLING-HOUSE ON SUNDAY — STATUTE APPLICABLE TO CITY OF DENVER UNDER PRESENT CHARTER.**— By the general law of the state the keeping open of a tippling-house on the Sabbath day or night is made a criminal offense, punishable by fine or imprisonment; and the fact that such house is situate in the city of Denver will not avail as a defense under the present city charter. *Ib.*

6. **SUSPENSION OF A GENERAL LAW BY A CITY ORDINANCE — REPEAL OF THE ORDINANCE.**— When the suspension of a general law within a municipality results from a city ordinance passed in pursuance of a special charter, the repeal of the ordinance will leave the general law in force within the city. *Ib.*

7. **GARNISHMENT AFTER CLAIM DULY ASSIGNED.**— Where an individual who is working for a county, under a contract, gives the county clerk an order to deliver all warrants issued to him by the county to one J., as collateral security for a note attached to the order, the acceptance of such order by the written indorsement of the county clerk thereon perfects the assignment, and places the assignor's claim against the county beyond the reach of garnishment. *Lewis v. Commissioners*, 371.

8. **POWER OF MUNICIPAL CORPORATIONS TO LICENSE.**— The authority of municipal corporations to grant licenses for occupations carried on within their limits exists by force of the statute alone, and they cannot legally exact license fees from those engaged in business pursuits not included or covered by the statute. *Bernheimer v. City of Leadville*, 518.

9. **AN INSURANCE AGENT IS NOT AN INSURANCE BROKER.**— An insurance agent employed by one company to represent it in soliciting applications for insurance, with authority to write and issue policies, is not an insurance broker nor subject to a city ordinance requiring insurance brokers to pay a license fee. *Ib.*

NEGLIGENCE:

1. **NEGLIGENCE OF MINING COMPANY — RIGHT OF EMPLOYEE TO RECOVER DAMAGES FOR INJURIES OCCASIONED BY REASON THEREOF.** Where a mine is operated by a company through an incline extending from the surface several hundred feet into the earth, by means of cars run upon iron rails laid therein, and it is an established rule of the company that a signal called a "tally" shall be sounded at twenty-three minutes before 5 o'clock every evening, at which time the cars shall cease running up and down the incline and the workmen shall have the right of way for the space of seven minutes to reach the surface, it is negligence on the part of the company to permit a car to go down the incline after the

NEGLIGENCE — Continued.

"tally" is sounded, and a miner injured thereby is entitled to recover damages. *Silver Cord C. M. Co. v. McDonald*, 191.

2. **ESTOPPEL BY CONDUCT.**— Defendant, through its negligence, having put plaintiff in a position of danger, could not complain that he did not exercise cool presence of mind in his endeavor to escape therefrom. *Ib.*

3. **GROSS CARELESSNESS AND NEGLIGENCE INCONSISTENT WITH DEFENSE BY REASON OF UNAVOIDABLE ACCIDENT.**— A defense based on unavoidable accident is not available where it clearly appears that the gross carelessness and negligence of the defendant contributed to the injury complained of. *Greeley Irrigating Co. v. House*, 549.

NEGOTIABLE INSTRUMENTS: See **BILLS OF EXCHANGE;**
PROMISSORY NOTES.

NEW TRIAL:

1. **PRACTICE — SURPRISE, WHEN A GROUND FOR NEW TRIAL.**— When a party, in the midst of a trial, is taken unawares, and, without fault of his own, is placed in a situation greatly injurious to his interests, as by the unexpected admission of evidence upon an issue which, by reason of an order of court made previous to the commencement of the trial, he was not prepared to meet, a case of surprise is presented which, if not otherwise remedied, may be made a ground of motion for a new trial. *Colorado M. R'y Co. v. Bowles*, 85.

2. **TRIAL BY COURT — MOTION FOR NEW TRIAL — BILL OF EXCEPTIONS.**— Where a trial is had to the court, and its findings announced, an undetermined motion for a new trial operates to reserve the case, and continue the jurisdiction beyond the term for the purpose of disposing of the motion and settling a bill of exceptions. *Stocking v. Morey*, 317.

3. **MOTIONS FOR NEW TRIAL — DISCRETION OF TRIAL COURTS.**— Trial courts are vested with a large discretion in determining motions for a new trial, and, unless there be an illegal exercise of such discretion or a clear abuse thereof, appellate courts refuse to interfere. *Cook v. Doud*, 483.

4. **SAME — COMMENTS OF COUNSEL ON THE ABSENCE OF EXCLUDED EVIDENCE.**— Where, in action for assault, evidence as to the relations of the parties prior to the assault has been excluded, it is within the discretion of the court to grant a new trial on account of remarks of defendant's counsel commenting on the absence of such evidence, and intended to prejudice the jury against plaintiff by producing the impression that there was great provocation to the assault. *Ib.*

NONSUIT: See **PRACTICE IN CIVIL ACTIONS**, 62.

NOTICE:

1. **A CHOSE IN ACTION MAY BE ASSIGNED WITHOUT NOTICE.**— Notice to the debtor by the assignee of a chose in action is not necessary to complete the assignment, where there is no controversy between the different assignees or attaching creditors of the fund assigned. *Jackson v. Hamm*, 58.

2. **NEGOTIABLE INSTRUMENTS — BONA FIDE PURCHASERS.**— Where A. indorses drafts in blank to B. for collection, and B., wrongfully assuming to be the owner, sells and disposes of them to C., who has no knowledge of the want of ownership in B., C. is invested with good title, so as to retain the proceeds as against A. *Coors v. German Nat. Bank*, 202.

NOTICE—*Continued.*

3. C. is not chargeable with notice of ownership in A. by the fact that in B.'s letter, sending the drafts to C., they were described as "A.'s acceptances." *Ib.*

4. TAKING APPEAL FROM THE COUNTY TO THE DISTRICT COURT—NOTICE.—An appeal from the county court to the district court is not taken by reason of the fact that it is "prayed and allowed." The appeal bond must be filed and approved before the appeal can be considered "taken"—that is, perfected; and if this be not done on the day on which judgment is rendered, the notice in writing must be served or the appeal will be dismissed. *Law v. Nelson*, 409.

5. APPEAL—FAILURE OF APPELLANT TO SERVE NOTICE WAIVED BY GENERAL APPEARANCE OF APPELLEE.—In case of an appeal from the county court to the district court under the act of 1885 (Sess. Laws, 1885, p. 159) by a defendant some days subsequent to entry of judgment against him, his failure to serve notice of the appeal upon the plaintiff within five days after taking the same is waived and cured by a full appearance in the district court by the appellee and his participation in the action of the court in setting the cause down for trial *de novo*. Such action is a waiver of appellee's privilege to have the appeal dismissed or the judgment affirmed for failure to serve the required notice. *Robertson v. O'Reilly*, 411.

6. FAILURE TO SERVE NOTICE OF APPEAL IN TIME PRESCRIBED NOT CURED BY SUBSEQUENT NOTICE.—If appellee gives written notice to appellant that he will apply for dismissal of the appeal or affirmance of the judgment, and follows it up with diligence, a subsequent notice by appellant that the appeal has been taken will not defeat appellee's right to its dismissal. *Straat v. Blanchard*, 445.

7. CONSTRUCTIVE NOTICE OF MORTGAGE LIEN.—The recording of a mortgage, regular in form and correctly describing the property incumbered, operates as constructive notice to third persons of the lien created thereby. *Seaman v. Haz*, 536.

8. EVIDENCE OF THE POSTING OF NOTICES.—Where notices are required to be posted in three of the most public places in the precinct, evidence showing that one of such notices was posted on the front door of the court-house, one on the side of the stairs leading to the justice's office and one on a certain corral fence, and that "these places were then regarded, and would now be, three about as public places as could be found in the precinct," shows a sufficient compliance with the statute as against a collateral attack on the proceedings. *Conway v. John*, 80.

OFFICE AND OFFICERS:

1. CUSTODIAN OF PUBLIC MONEYS APPROPRIATING THE INTEREST.—The receipt, by the legal custodian of public moneys, of interest thereon from banks with which the same is deposited for safe-keeping, is not in and of itself alone an offense at common law. *In re Breene*, 401.

2. CORRECTING OFFICER'S RETURN.—When it appears that the notice of attachment on realty filed with the clerk and recorder is correct, it is not error, on application supported by affidavits and notice to opposing counsel, to allow the sheriff to amend his return by correcting a misdescription of the realty attached. *McClure v. Smith*, 297.

ORDINARY DILIGENCE:

FAILURE TO COLLECT SECURED CLAIM.—A party accepting a note and chattel mortgage in his own name, to secure his own claim as well as the individual claim of another as a matter of accommo-

ORDINARY DILIGENCE—Continued.

action to the latter, and without compensation, is only bound to exercise ordinary diligence, and is not liable for a failure to realize on the securities without proof of negligence. *Cross v. Kistler*, 571.

PARTIES (see, also, PRACTICE IN CIVIL ACTIONS):

1. **RIGHT OF ASSIGNEE TO MAINTAIN SUIT IN HIS OWN NAME—RECORD MAY BE AMENDED WHEN ACTION BECOMES FOR USE OF ANOTHER PARTY.**—The assignee of a claim against the receiver of a railway company, having obtained permission from the proper court, may, under the code, bring suit in his own name, and though the assignment be indorsed to another, he may still maintain the action in his own name so long as he retains possession of the instrument of assignment, and may cause the record to be amended by adding the name of the indorsee as the use party, who will thereafter be entitled to control the proceedings, and will be bound by the judgment. *Jackson v. Hamm*, 58.

2. **PROPER PARTIES TO AN ACTION ON A CONTRACT HELD AS COLLATERAL SECURITY.**—Where a contract for the sale of real estate contains a stipulation that it shall not be "assignable or negotiable," and that the purchase money shall be payable only to the vendor, and the contract was afterwards assigned by the vendor to a third party as security for a loan of money, the proper parties to an action to enforce it are as follows: (1) The assignee has such an interest in the contract as makes him a proper party to an action to enforce it. (2) The vendor, after such assignment, still retains such an interest in the contract as makes him a proper party to an action for its enforcement. (3) After the death of the vendor, pending such litigation, his executors have the right to be substituted as parties, and such right is not extinguished by the act of the assignee in asking to be made sole plaintiff, and the order of the court in making him such; nor does such order work a discontinuance as to the executors, though made with their full knowledge. Neither does the fact that, by making the executors parties to the action, defendants were rendered incompetent to testify as witnesses in their own behalf, affect the right of the executors to become parties. *Butler v. Rockwell et al.* 125.

3. **PROPER PARTIES TO CIVIL ACTION—REMEDY FOR REFUSAL OF ONE TO JOIN.**—The party in whom the legal title to a claim is vested, and the party who is the legal owner of the claim, are proper parties to an action for its recovery; and where the consent of one of such parties to the use of his name as a joint plaintiff cannot be obtained, the statute authorizes the plaintiff to make him a defendant. *First Nat. Bank v. Hummel*, 259.

4. **PARTITION—WHO ARE NECESSARY PARTIES TO THE ACTION.**—In proceeding under the statute for partition it is only necessary, at least in the first instance, to make those interested in the property as joint tenants, tenants in common or coparcenary parties to the action. An answer which avers that a lease had been granted "prior to the commencement of this suit," and that the lessees "have been in possession," etc., without disclosing the terms, duration or continued existence of the lease, is insufficient to require the supposed lessees to be made parties. *Jordan v. McNulty*, 280.

5. **OBJECTIONS WAIVED WHEN NOT PROPERLY RAISED.**—Objections for defect of parties must be raised either by demurrer or answer, or they will be waived. *Fitzgerald v. Burke*, 559.

PARTITION:

1. PARTITION OF REAL ESTATE—PARTIES AND PLEADINGS.—In a proceeding under the statute for the partition of real estate it is only necessary, at least in the first instance, to make those persons parties who are interested in the property as joint tenants, tenants in common or coparcenary. Lessees having no definite or subsisting leasehold interest in the premises sought to be partitioned are not necessary parties; and an answer which avers that a lease has been granted "prior to the commencement of this suit," and that the lessees "have been in possession," etc., without disclosing the terms, duration or continued existence of the lease, is insufficient to require the supposed lessees to be made parties. *Jordan v. McNulty*, 280.

2. REFUSAL OF COMMISSIONERS TO ACT—SUBSTITUTION OF ANOTHER WITHOUT NOTICE.—Where a commissioner appointed by the court to make partition of real estate declines to serve, the court may substitute another person in his place without notice to the parties. If the appointee be objectionable by reason of coming within any of the exceptions enumerated in the statute, the objection may be raised after the appointment, or it may be interposed as an objection to the report before its confirmation. *Ib.*

3. IRREGULARITIES WHICH MAY BE CURED—FAILURE TO TAKE THE OATH IN THE FIRST INSTANCE NOT A REVERSIBLE ERROR.—Where the commissioners appointed to make partition of lands view the premises before a certain member thereof has taken the oath prescribed by statute, and their report is filed, but not confirmed, and afterwards, and before filing of the final report, said commissioner takes the oath, the filing of the first report does not render the commission *functus officio*, nor is the failure to take the oath before viewing the premises a reversible error. *Ib.*

PARTNERSHIP:

1. SET-OFF AGAINST A PARTNERSHIP DEMAND.—As a general rule, debts due from one member of a partnership cannot be set off in a suit to collect claims or accounts belonging to the firm. *Hamill v. First Nat. Bank*, 1.

2. SAME—EFFECT GIVEN TO AN AGREEMENT FOR SET-OFF.—But if it can be shown that all parties concerned, including members of the partnership, expressly or impliedly agree that a debt owing by one of the partners may be set off against a debt owing to the firm, or *vice versa*, effect will be given to the agreement. *Ib.*

3. PARTNERSHIP—SURVIVORS.—An action for a firm debt cannot be maintained against the estate of a deceased partner, in the absence of proof of a final settlement between the surviving partner and the estate, and that the partnership assets are insufficient to pay the debt. *Beaton v. Wade*, 4.

4. TRANSFER OF STOCK IN TRADE BY AN INSOLVENT FIRM—RATIFICATION BY CREDITORS.—Where an insolvent firm has transferred all its property, taking notes in payment, its creditors, who have not sought to have the sale set aside, but have treated it as legitimate by proceeding against the purchasers by attachment for the money supposed to be due on the notes, cannot question the *bona fides* of the sale. *Sickman v. Abernathy*, 174.

5. RIGHT OF PARTNERSHIP FIRM TO CONTRACT AS TO MANNER OF PAYMENT OF NOTES TO BECOME DUE ON SALE OF ITS EFFECTS.—In such proceeding, evidence as to contracts between the firm and the purchasers, as to the manner of payment of the notes, is im-

PARTNERSHIP — Continued.

material, since the parties had a right to make any contract they chose as to the mode of paying the notes. *Ib.*

6. CREDITOR'S LIEN AGAINST PARTNERSHIP ASSETS. — No creditor's lien can attach to the partnership assets of an insolvent firm until they have been brought into the custody of the law by the interposition of the court. *Ib.*

7. MINING COPARTNERSHIP — STATUTE OF FRAUDS NOT INVOLVED IN ACTION FOR SETTLEMENT OF ACCOUNTS AND DISTRIBUTION OF ASSETS. — When the business of a partnership, organized to lease and operate a mine during a limited period for the sole purpose of making a profit through the extracting and marketing ores therefrom, has been terminated, in a suit brought by one of the partners to settle the partnership accounts and distribute the partnership profits and other assets, no interest in realty is involved. In such case the right to a settlement in no way depends upon the legal status of realty under the statute of frauds. *Meagher v. Reed*, 335.

PAYMENT:

1. WHEN VALIDITY OF PAYMENTS CANNOT BE QUESTIONED. —

Where an insolvent firm has transferred all its property, taking notes in payment, its creditors, who have not sought to have the sale set aside, but have treated it as legitimate, by proceeding against the purchasers by attachment for the money due on the notes, cannot in such proceeding attack the validity of the payments made by the purchasers, though the latter had knowledge of the firm's indebtedness, since there is no privity between them and the purchasers. *Sickman v. Abernathy*, 174.

2. RIGHT OF PARTNERSHIP FIRM TO CONTRACT AS TO MANNER OF PAYMENT OF NOTES TO BECOME DUE IT ON SALE OF ITS EFFECTS. — In such proceeding, evidence as to contracts between the firm and the purchasers, as to the application of accounts due the firm by the parties individually on said notes, which accounts had been assigned to the purchasers with the other firm accounts, is immaterial, since the parties had a right to make any contract they chose as to the mode of paying the notes. *Ib.*

PERSONAL PROPERTY:

1. A CONTRACT FOR PURCHASE AND SALE OF ORES AS MINED VESTS TITLE IN THE PURCHASER ON DELIVERY OF THE ORES. — Under a contract with the owners of a mine to furnish supplies and money, and in return to receive the ore as it is mined, the title to the ore vests in the purchaser on delivery thereof, and a creditor of the mine owners thereafter attaching the ore takes nothing by his levy. *Finding v. Hartman*, 596.

2. SALE AND DELIVERY OF STOCK IN TRADE BY FAILING MERCHANT. — Where a merchant in failing circumstances transfers and delivers to a creditor, in liquidation of his claim, his entire stock in trade and fixtures, and an hour or two afterwards he is appointed by the creditor his agent to sell the stock and close up the business, the possession being delivered him for that purpose, and afterwards the property is attached by another creditor, a jury is justified in finding that the sale was not accompanied by an immediate delivery and followed by an actual and continued possession, as required by the statute of frauds. *Baur v. Beall*, 383.

3. EXEMPTION STATUTE APPLIES TO MERCHANTS AND SHOP-KEEPERS. — The statute exempting from levy and sale on execution or attachment the tools, implements, etc., not exceeding \$300 in value, of any mechanic, miner or other person, not being the head

PERSONAL PROPERTY — Continued.

of a family, used and kept for the purpose of carrying on his trade and business, covers and includes the stock in trade of a merchant or shop-keeper kept for the purpose of sale, to the extent specified in the statute, the same as the property of other persons. *Martin v. Bond*, 466.

PLEADING:

1. VERIFICATION OF PLEADINGS—WAIVING DEFECTS. — Where the complaint is verified by one of plaintiffs' attorneys, but no reason why it is not verified by the parties is stated, as required by the Civil Code, such defect is waived when defendants make no objection to the verification in the court below, and file an answer, duly verified, as to some of the defenses, and not verified as to others. *Nichols v. Jones*, 61.

2. PRACTICE—STRIKING OUT UNVERIFIED PORTIONS OF ANSWER. Where the answer contains several defenses, some of which are verified and others not, it is not error to strike out the unverified portion of the answer, with leave to defendants to further answer as to such portion if they should so desire. *Ib.*

3. SAME—WHEN A DEFENSE MAY BE TREATED AS INSUFFICIENT. Where a defense set up in the answer is ordered stricken out, which by some error is not done, and the court afterwards correctly treats the defense as insufficient to raise an issue, defendants cannot complain. *Ib.*

4. POLICY OF CODE PLEADING—STRIKING OUT SHAM DEFENSES. It is the policy of the code to suppress falsehood and secure truth in pleadings, and as one means of securing such result authority for striking out sham answers and defenses is given. *Patrick v. McManus*, 65.

5. COUNTER-CLAIMS SUBJECT TO SAME RULE.—A counter-claim, if sham, may be stricken out upon motion. *Ib.*

6. ELEMENTS OF SHAM PLEAS.—The essential element of a sham plea is its falsity. *Ib.*

7. POWER TO STRIKE OUT NOT TO BE EXERCISED WHERE CONFLICT OF FACT INVOLVED.—The power to strike out must, however, be exercised with caution. Under it the court cannot determine the truth or falsity of a plea upon conflicting evidence. *Ib.*

8. CONSEQUENCE OF FAILURE TO ALLEGE SPECIAL DAMAGE IN EJECTMENT.—Where the complaint in ejectment contains no allegation of special damage, the damages recoverable cannot include the value of the use of the premises by defendant. *Arnold v. Woodward*, 164.

9. UNITING DIFFERENT CAUSES OF ACTION—DEMAND OF PLAINTIFF FOR REIMBURSEMENT.—A complaint by one in whom is vested the legal title only to the fund sued for does not improperly unite different causes of action, where, in addition to the prayer for judgment against the principal defendant for this fund, it asks that the beneficial owner of the fund, who declined to join in the action for its recovery as a party plaintiff, and for this reason was made a defendant, reimburse the plaintiff for all costs and expenses of the suit, that being the only relief prayed against him. *First Nat. Bank v. Hummel*, 259.

10. PARTITION—PARTIES—PLEADING.—In proceeding under the statute for partition it is only necessary, at least in the first instance, to make those interested in the property as joint tenants, tenants in common or coparcenary parties to the action. An answer which avers that a lease had been granted "prior to the commencement of this suit," and that the lessees "have been in possession," etc., without disclosing the terms, duration or con-

PLEADING — *Continued.*

tinued existence of the lease, is insufficient to require the supposed lessees to be made parties. *Jordan v. McNulty*, 280.

11. ELECTION CONTESTS. — A general averment of election frauds, or the intimidation of voters, is insufficient. Under the rules of the supreme court in relation to election contests, proper ultimate facts must be pleaded as in other cases. *Todd v. Stewart*, 286.

12. PLEADING — THE CHARACTER AND OBJECT OF AN ACTION DETERMINED BY THE COMPLAINT. — The allegations of a complaint determine the character and object of an action, and the plaintiff cannot be permitted, after the trial of a cause, to assume a wholly different object as the purpose of the action. *Hunt v. Mining Co.* 451.

13. CODE PLEADING — UNITING SEVERAL CAUSES OF ACTION IN THE SAME COUNT. — At common law the pleader might unite in one count several *indebitatus assumpsit* counts relating to the same subject-matter; and when the same course is pursued under the code a general demurrer, when either count is good, must be overruled. *Campbell v. Shiland*, 491.

14. COMMON-LAW FORMS SUFFICIENT UNDER CODE AS TO ALLEGATIONS OF FACT. — A count in *indebitatus assumpsit*, framed substantially as required at common law, sufficiently complies with the code mandate as to allegations of fact. *Ib.*

15. PLEADINGS, ISSUES AND TESTIMONY. — Where an answer to a complaint upon a policy of insurance averred that material statements in the plaintiff's application for insurance were not true, a replication thereto averring that the plaintiff did not make or sign the application, but that it was written without his knowledge by the agent of the insurance company, the replication not being attacked by demurrer or motion, makes the responsibility for the application a material issue in the case, and entitles the insured to testify that he did not make or sign it, and to give his version of what actually took place between himself and the agent in reference to the application. *State Ins. Co. v. Taylor*, 499.

16. THE STATUTE OF LIMITATIONS PLEADABLE TO ANY ONE OF SEVERAL DISTINCT CAUSES OF ACTION. — Where several distinct causes of action are united in a single count, the plea of the statute of limitations may be interposed to any one or all of the items comprising the several causes of action. *Gilpin v. Adams*, 512.

17. PLEADING — LEGAL EFFECT OF UNCONTROVERTED ALLEGATIONS. — Every material allegation of a complaint or answer, not controverted, must, for the purposes of the action, be taken as true. *Wilson v. Hawthorne*, 530.

18. JURISDICTION — HOW A JUDGMENT MAY BE IMPEACHED. — A judgment rendered without obtaining jurisdiction of the person may be impeached by a proceeding in equity, or by answer to an action where equitable defenses are allowable. *Ib.*

19. SAME — ALLEGATION OF MERITS. — An allegation of merits should be made in a complaint or answer denying the validity of a judgment as an earnest of good faith; but such allegation is not essential or traversable. *Ib.*

20. UNDER CODE PRACTICE A JOINT EQUITABLE DEFENSE MAY BE SUFFICIENT AS TO ONE DEFENDANT THOUGH INSUFFICIENT AS TO OTHERS. — The rigid rule in common-law actions that a joint plea insufficient as to one defendant is insufficient as to all is not applicable to an equitable defense, under the Colorado Code of Procedure. *Quere*, whether a judgment rendered against several parties may be maintained against those over whom jurisdiction was regularly obtained, when set aside as to others for want of jurisdiction. *Ib.*

PLEADING — Continued.

21. **PLEADING — AVERMENTS AND ISSUES.**—The denial in a pleading of "legal notice * * * so as in any way to affect * * * the title derived," etc., does not put in issue the allegation of notice in the pleading answered. *Seaman v. Hax*, 536.

22. **PLEADING INSUFFICIENT DEFENSES — REPLICATION UNNECESSARY.**—A plea in an action on a written contract setting up a contemporaneous parole agreement inconsistent with the written contract is insufficient, and requires no replication. *Fitzgerald v. Burke*, 559.

23. **SAME — DEFENSE OF RECOVERY AGAINST A JOINT OBLIGOR NO BAR WITHOUT ALLEGATION OF SATISFACTION OF JUDGMENT.**—A plea that the contract sued on is joint and several, and that plaintiff has already recovered judgment against one of the joint and several obligors in another suit, but not alleging satisfaction of the judgment, is insufficient to constitute a defense. *Ib.*

24. **NECESSARY PARTIES — WAIVER.**—Objections for defect of parties must be raised either by demurrer or answer, and if not so raised they are waived. *Ib.*

POSSESSION:

1. **A LANDLORD'S POSSESSION RECOGNIZED BY INSTITUTION OF SUIT BY HEIR OF TENANT.**—The bringing of an action for the recovery of the land, by an heir of the former tenant of the defendant, is a sufficient recognition that the relation of landlord and tenant had been terminated so as to entitle the heir to sue for possession under a patent for the land granted to the tenant, where the landlord was and had been in possession for years under a judgment recovered against the tenant in a former action. *Arnold v. Woodward*, 164.

2. **ADVERSE POSSESSION.**—One cannot hold adversely to another under the statute requiring "a claim and color of title made in good faith" as a ground of adverse possession, when he knows that his entry in the land-office has been set aside or disregarded, and a patent has issued to the person against whom he claimed an adverse holding. *Ib.*

3. **TAKING POSSESSION OF GOODS ON DEFAULT OF PAYMENT OF DEBT SECURED BY CHATTEL MORTGAGE.**—On default of payment the mortgagee must take actual possession of the property, and it must be open, notorious and unequivocal, such as to apprise the community or those accustomed to deal with the party that the goods have changed hands and passed out of the mortgagor, otherwise they will be subject to levy and sale for the mortgagor's debts and to the rights of subsequent purchasers in good faith. *Atchison v. Graham*, 217.

POWER OF ATTORNEY: See ATTORNEY IN FACT.**PRACTICE IN CIVIL ACTIONS:**

1. **OBJECTIONS TO PLEADINGS.**—Objections to a complaint on the ground of misjoinder of parties, or that several causes of action are improperly united, and other like objections, if not taken by demurrer or answer, will be deemed waived. *Brahoney v. R. R. Co.* 27.

2. **EVIDENCE — ORAL PROOF OF CONTENTS OF MISSING FILES.**—The proper foundation being laid, the character and contents of the missing files in a cause tried before a justice of the peace may be established by oral evidence. *Conway v. John*, 80.

3. **ATTACHMENTS BEFORE JUSTICES OF THE PEACE — SERVICE OF NOTICES ON NON-RESIDENTS.**—Under the act of 1879, in relation to attachments before justices of the peace, requiring notices in cer-

PRACTICE IN CIVIL ACTIONS—Continued.

tain instances to be posted in three of the most public places within the precinct, evidence showing that one of such notices was posted on the front door of the court-house, one on the side of the stairs leading to the justice's office, and one on a certain *corral* fence, and that "these places were then regarded, and would now be, three about as public places as could be found in the precinct," shows a sufficient compliance with the statute, as against a collateral attack upon the proceedings. *Ib.*

4. **ATTACKING JUDICIAL SALE—INADEQUACY OF PRICE.**—Ordinarily, inadequacy of price paid is not alone sufficient cause for setting aside a judicial sale, particularly of personal property of fluctuating value. *Ib.*

5. **ELECTION CONTESTS—JURISDICTION OF COUNTY COURT.**—The statements required by the statute are necessary to give the courts jurisdiction; and where no effort is made by the contestor to comply with the requirements of the act in this regard, and a plea to the jurisdiction of the court is interposed by the contestee, setting up such defect, the court is without jurisdiction to proceed with a trial upon the merits. The statute furnishes a complete system of procedure within itself, and before a contestor can legally invoke the jurisdiction of the court he must state the facts required to bring his case within the purview of the statute. *Schwarz v. County Court*, 44.

6. **ATTEMPT TO EXCUSE OMISSIONS IN STATEMENT.**—The omission to furnish the list of names required by statute cannot be justified by subsequently alleging that the information necessary to prepare the same was in the hands of contestee, by whose fraud and violence contestor was prevented from obtaining it, when no effort was made in the first instance to either comply with the statute or to excuse the failure. *Ib.*

7. **UNSEASONABLE OFFER TO AMEND STATEMENT.**—Where it does not appear that any attempt has been made to comply with the statutory requirement by furnishing the list, and no excuse is offered for failing to do so, amendment of the petition for that purpose, at a late day in the proceedings, is unwarrantable, in the absence of a statute directly authorizing its amendment. *Ib.*

8. **WRIT OF CERTIORARI—WHEN PREMATURELY ISSUED WILL BE QUASHED.**—It is only the final determination of an inferior tribunal which can be reviewed upon a writ of *certiorari*. When it is sought to review thereby orders and proceedings in a cause preliminary to final judgment the writ will be quashed. *Ib.*

9. **OBJECTIONS TO PLEADINGS MUST BE SEASONABLY MADE.**—An objection that the individual names of the defendants as copartners are not set out in the complaint, appearing for the first time at the close of plaintiff's evidence, is not seasonably made. *Simonton v. Rohm*, 51.

10. **ISSUES OF FACT—PROVINCE OF JURY.**—The weight of the evidence and the credibility of the witnesses are matters of which the jury are the proper judges. *Ib.*

11. **INSTRUCTIONS SUBSTANTIALLY CORRECT NOT CAUSE FOR REVERSAL.**—Though some of the instructions, separately considered, be not as perfect and accurate in form as they might be, nevertheless, if the charge as a whole fairly submits the questions at issue for the determination of the jury upon the evidence, the verdict should not be disturbed. *Ib.*

12. **EVIDENCE—BURDEN OF PROOF.**—Where plaintiff's claim for wages as sued for was admitted, defendant was properly required to assume the burden of proving payment. *Lovelock v. Gregg*, 53.

PRACTICE IN CIVIL ACTIONS — *Continued.*

13. BOOK ENTRIES — WHEN PROPERLY EXCLUDED. — Where the entries in a book of account were made a week or more after the transactions occurred to which they related, and where the book of account was mutilated by the book-keeper cutting out the leaves on which the account was kept, the book was properly excluded as evidence. *Ib.*

14. GARNISHMENT — LEGAL STATUS OF GARNISHEE. — Under no circumstances shall a garnishee, by the operation of the proceedings against him, be placed in any worse condition than he would be in if the defendant's claim against him were enforced by the defendant himself. *Sauer v. Town of Nevada*, 54.

15. MUNICIPAL CORPORATION AS GARNISHEE — WHAT MAY BE SHOWN IN DISCHARGE OF LIABILITY. — When an incorporated town is summoned as garnishee on account of salary due one of its officers, the town may show in discharge of its liability that the officer is a collector of its taxes, and, as such, has received money of the town, which he insists upon retaining, equal to the amount of salary due him. It is not to be inferred, however, that the officer has a right to insist upon retaining money under such circumstances; for the right of election to treat money in the hands of a receiver of the public revenue as a simple contract debt or as a trust fund is with the municipality, and not with the collecting officer. *Ib.*

16. ACTION BY ASSIGNEE OF CHOSE IN ACTION — NOTICE TO DEBTOR, WHEN NOT NECESSARY TO COMPLETE ASSIGNMENT. — Notice to the debtor by the assignee of a chose in action is not necessary to complete the assignment, where there is no controversy between the different assignees or attaching creditors of the fund assigned. *Jackson v. Hamm*, 58.

17. RIGHT OF ASSIGNEE TO MAINTAIN SUIT IN HIS OWN NAME — RECORD MAY BE AMENDED WHEN ACTION BECOMES FOR USE OF ANOTHER PARTY. — The assignee of a claim against the receiver of a railway company, having obtained permission from the proper court, may, under the code, bring suit in his own name, and, though the assignment be indorsed to another, he may still maintain the action in his own name so long as he retains possession of the instrument of assignment, and may cause the record to be amended by adding the name of the indorsee as the use party, who will thereafter be entitled to control the proceedings, and will be bound by the judgment. *Ib.*

18. PLEADINGS IN CIVIL ACTIONS — WAIVING DEFECTS THEREIN. Where the complaint is verified by one of plaintiff's attorneys, but no reason why it is not verified by the parties is stated, as required by the Civil Code, such defect is waived when defendants make no objection to the verification in the court below, and file an answer, duly verified, as to some of the defenses, and not verified as to others. *Nichols v. Jones*, 61.

19. PRACTICE — STRIKING OUT UNVERIFIED PORTIONS OF ANSWER. — Where the answer contains several defenses, some of which are verified and others not, it is not error to strike out the unverified portion of the answer, with leave to defendants to further answer as to such portion if they should so desire. *Ib.*

20. SAME — WHEN A DEFENSE MAY BE TREATED AS INSUFFICIENT. — Where a defense set up in the answer is ordered stricken out, which by some error is not done, and the court afterwards correctly treats the defense as insufficient to raise an issue, defendants cannot complain. *Ib.*

21. POLICY OF CODE PLEADING — STRIKING OUT SHAM DEFENSES. It is the policy of the code to suppress falsehood and secure truth

PRACTICE IN CIVIL ACTIONS — Continued.

in pleadings, and as one means of securing such result authority for striking out sham answers and defenses is given. *Patrick v. McManus*, 65.

22. COUNTER-CLAIMS SUBJECT TO SAME RULE.— A counter-claim, if sham, may be stricken out upon motion. *Ib.*

23. ELEMENTS OF SHAM PLEAS.— The essential element of a sham plea is its falsity. *Ib.*

24. POWER TO STRIKE OUT NOT TO BE EXERCISED WHERE CONFLICT OF FACT INVOLVED.— The power to strike out must, however, be exercised with caution. Under it the court cannot determine the truth or falsity of a plea upon conflicting evidence. *Ib.*

25. APPEAL FROM POLICE MAGISTRATE TO DISTRICT COURT.— Originally the charter of defendant provided for the election of "one justice of the peace to be denominated 'police judge,' for the city of Central." By subsequent amendment the language was so changed as simply to require the election of "one police judge." The city charter further contained the following provision: "Appeals shall be allowed from decisions in all cases arising under the provisions of this act, or any ordinance passed in pursuance thereto, to the district court; and every such appeal shall be granted in the same manner, and with like effect, as appeals are taken from and granted by justices of the peace under the laws of this territory." Afterwards the course of appeal from justices of the peace to the district court was changed to the county court. *Held*, notwithstanding, that an appeal would lie from the police judge to the district court. *Huer v. City of Central*, 71.

26. ERROR TO DISMISS CAUSE WHEN PENDING ON APPEAL.— On such an appeal, irrespective of the question of jurisdiction, the district court was not authorized to dismiss the cause. *Ib.*

27. ADMISSION OF MINER'S LIEN STATEMENT IN EVIDENCE.— A statement upon which a miner's lien is sought to be based, which clearly expresses an intention to hold and claim a lien, and contains a description of the property complete on its face, and shows the sum total in dollars and cents which the claimant's work amounts to, and states that the same is due, and that no portion of it has been paid, is admissible in evidence against an objection challenging its sufficiency. *Rico R. & M. Co. v. Musgrave*, 79.

28. WHEN STATEMENT FOR LIEN INCLUDES SEVERAL MINING CLAIMS, HOW NECESSARY FACTS MAY BE ESTABLISHED.— A statement filed in the recorder's office against several mining claims need not state that said claims are owned, claimed or worked by the same person or persons, so as to be deemed one mine, for the purposes of the miner's lien statute; it is sufficient if such matters are established by proper averment and proof, or by proof alone, when the defect in the pleadings is waived by answering over. *Ib.*

29. A CONTRACT WITH OWNER OR AGENT OF PROPERTY ESSENTIAL TO A LIEN — BURDEN OF PROOF.— To entitle a party to such lien there must be a contract, express or implied, with the owner of the property on which the lien is claimed. The burden of proving such contract rests on the party asserting it, and he must ascertain for himself whether the person with whom he contracts is the owner, or has an interest in the land on which he expects to claim a lien. It is sufficient if the contract be with an authorized agent of the owner. *Ib.*

30. WHEN EVIDENCE TAKEN AT FORMER TRIAL MAY BE USED ON RETRIAL.— On a retrial, where there has been a loss of witnesses by death or removal from the jurisdiction of the court, evidence taken at the former trial and preserved by bill of exceptions, or otherwise correctly preserved, may be resorted to. *Ib.*

PRACTICE IN CIVIL ACTIONS — *Continued.*

81. EMINENT DOMAIN — PROCEEDINGS AT SUIT OF A RAILWAY COMPANY FOR RIGHT OF WAY PENDING THE SUSPENSION OF A PRE-EMPTION CLAIM — DISCRETION OF COURT. — When the entry of a pre-emption claimant has been suspended, and proceedings to condemn a right of way through the land for a railroad have been instituted, the claim of the railway company for a continuance of the latter proceedings pending the determination of the suspended entry by the department of the general land-office appeals strongly to the discretion of the court. *Colorado M. R'y Co. v. Bowles*, 85.

82. PRACTICE — SURPRISE, WHEN A GROUND FOR NEW TRIAL. — When a party, in the midst of a trial, is taken unawares, and, without fault of his own, is placed in a situation greatly injurious to his interests, as by the unexpected admission of evidence upon an issue which, by reason of an order of court made previous to the commencement of the trial, he was not prepared to meet, a case of surprise is presented which, if not otherwise remedied, may be made a ground of motion for a new trial. *Ib.*

83. PRACTICE IN COURTS OF EQUITY — RIGHTS FORFEITED BY LACHES OF PARTIES. — Courts of equity will only grant relief in case the application therefor is made without unreasonable delay. The strongest equity may be forfeited by laches or abandoned by acquiescence. *Great West. M. Co. v. W. of A. M. Co.* 90.

84. FLUCTUATING CHARACTER OF PROPERTY TO BE CONSIDERED IN DETERMINING LACHES — MINING CLAIMS. — Where the subject-matter of a controversy is the right to unpatented mining property, the uncertain and fluctuating character of the property will be considered in determining the question of laches. *Ib.*

85. STATUTE OF LIMITATIONS SUPERIOR TO COURTS OF EQUITY. — The statute of limitations fixes a limit beyond which the courts cannot extend the time, but within this limit the peculiar doctrine of courts of equity will prevail. *Ib.*

86. VOID AND VOIDABLE JUDGMENTS. — As a rule, a judgment of a court of general jurisdiction is void in no case except when it appears from the record itself that the court, in pronouncing it, acted without jurisdiction. *Ib.*

87. PROPER PARTIES TO ENFORCE A CONTRACT FOR SALE OF REAL ESTATE HELD BY AN ASSIGNEE AS COLLATERAL SECURITY. — Where a contract for the sale of realty has been assigned by the vendor as collateral security for the loan of money, the proper parties to an action to enforce the contract are as follows: (1) The assignee has such an interest in the contract as makes him a proper party to an action to enforce it. (2) The vendor, after such assignment, still retains such an interest in the contract as makes him a proper party to an action for its enforcement. (3) After the death of the vendor, pending such litigation, his executors have the right to be substituted as parties, and such right is not extinguished by the act of the assignee in asking to be made sole plaintiff, and the order of the court in making him such; nor does such order work a discontinuance as to the executors, though made with their full knowledge. Neither does the fact that, by making the executors parties to the action, defendants were rendered incompetent to testify as witnesses in their own behalf, affect the right of the executors to become parties. *Butler v. Rockwell et al.*, 125.

88. WHEN JUDGMENT IN FAVOR OF A LANDLORD AGAINST A TENANT DOES NOT ESTOP HEIR OF TENANT. — A judgment in ejectment by a landlord against his tenant for a breach of the conditions of the lease will not bar a subsequent action against the landlord by an heir of the tenant to recover the land, on the ground that a patent was issued to the tenant during his tenancy, as in the for-

PRACTICE IN CIVIL ACTIONS—Continued.

mer action the tenant was estopped to deny his landlord's title. *Arnold v. Woodward*, 164.

89. **THE POSSESSION OF THE LANDLORD RECOGNIZED BY THE INSTITUTION OF SUIT BY THE HEIR.**—The bringing of an action by the heir of the tenant is a sufficient recognition that the relation of landlord and tenant had been terminated, so as to entitle the heir to sue for possession under the patent, where the landlord was, and had been for years, in possession under the judgment in the former action. *Ib.*

40. **PROPER PARTIES TO SUIT—REMEDY FOR REFUSAL OF ONE TO JOIN.**—The party in whom the legal title to a claim is vested, and the party who is the beneficial owner of the claim as well, are proper parties to an action for its recovery; and where the consent of such a party to the use of his name as a joint plaintiff cannot be obtained, the statute authorizes the plaintiff to make him a defendant. *First Nat. Bank v. Hummel*, 259.

41. **UNITING DIFFERENT CAUSES OF ACTION—DEMAND OF PLAINTIFF FOR REIMBURSEMENT.**—A complaint by one in whom is vested the legal title only to the fund sued for does not improperly unite different causes of action, where in addition to the prayer for judgment against the principal defendant for this fund, it asks that the beneficial owner of the fund, who declined to join in the action for its recovery as a party plaintiff, and for this reason was made a defendant, reimburse the plaintiff for all costs and expenses of the suit, that being the only relief prayed against him. *Ib.*

42. **PARTITION OF REAL ESTATE—NECESSARY PARTIES—PLEADINGS.**—In a proceeding under the statute for the partition of real estate, it is only necessary, at least in the first instance, to make those persons parties who are interested in the property as joint tenants, tenants in common or coparcenary. Lessees having no definite or subsisting leasehold interest in the premises sought to be partitioned are not necessary parties, and an answer which avers that a lease had been granted "prior to the commencement of this suit," and that the lessees "have been in possession," etc., without disclosing the terms, duration or continued existence of the lease, is insufficient to require the supposed lessees to be made parties. *Jordan v. McNulty*, 280.

43. **REFUSAL OF COMMISSIONER TO ACT—SUBSTITUTION OF ANOTHER WITHOUT NOTICE.**—Where a commissioner appointed by the court under the provisions of the statute to make partition declines to serve, the court may substitute another person in his place without giving notice to the parties. If the appointee be objectionable by reason of coming within any of the exceptions enumerated in the statute, the objection may be raised after the appointment, or it may be interposed as an objection to the report before its confirmation. *Ib.*

44. **IRREGULARITIES WHICH MAY BE CURED—FAILURE IN THE FIRST INSTANCE TO TAKE THE OATH NOT A REVERSIBLE ERROR.**—Where the commissioners appointed to make partition of lands view the premises before one of them has taken the oath prescribed by the statute, and their report is filed, which for some reason is not confirmed, and afterwards the commissioner takes the oath before the filing of the final report, the filing of the first report does not render the commission *functus officio*, nor is the failure to take the oath before viewing the premises a reversible error. *Ib.*

45. **CORRECTING OFFICER'S RETURN AS TO DESCRIPTION OF ATTACHED REALTY.**—When it appears that the notice of attachment upon realty, filed with the clerk and recorder, is correct, it is

PRACTICE IN CIVIL ACTIONS — Continued.

not error, on application supported by affidavits and notice to opposing counsel, to allow the sheriff to amend his return by correcting a misdescription of the realty attached. *McClure v. Smith*, 297.

46. **TRIAL BY COURT — MOTION FOR NEW TRIAL — BILL OF EXCEPTIONS.**— Where a trial is had to the court and its findings announced, an undetermined motion for a new trial operates to reserve the case and continue the jurisdiction beyond the term for the purpose of disposing of the motion and settling a bill of exceptions. *Stocking v. Morey*, 317.

47. **PRACTICE IN ATTACHMENT OF CHATTELS — EXAMINATION OF WITNESSES BY TRIAL JUDGE AS TO COMPETENCY.**— In an action for the alleged wrongful attachment of a stock of goods, where there is a wide difference of opinion among witnesses as to its value, it is not improper for the trial judge to subject the witnesses to a searching examination as to their competency, to enable the jury to judge of the value of their testimony. *Keith v. Wells*, 321.

48. **EVIDENCE — READING TO THE JURY ENTRIES IN BANK DEPOSIT BOOKS.**— Where bank deposit books have been admitted in evidence without objection, their contents are before the jury for consideration; and it is not prejudicial error for the trial court to permit the bank teller to read their contents to the jury, though he has no personal knowledge as to part of the entries. *Ib.*

49. **PARTICIPATION OF COURT IN EXAMINATION OF A PARTY TESTIFYING IN HIS OWN BEHALF.**— Unless it be shown that a party testifying in his own behalf was actually prejudiced by the participation of the court in his direct and cross-examination, such fact cannot be relied on as error. *Baur v. Beall*, 383.

50. **CONSTABLE'S SALE — ADMISSION OF THE RECORDS AND FILES OF THE JUSTICE'S COURT IN JUSTIFICATION.**— The record of a proceeding in the court of a justice of the peace, which is properly authenticated and proved, is admissible in evidence, in an action against a constable, to show justification by establishing the judgment, and the awarding of the writs under which the constable acted, and under which he justified. *Ib.*

51. **TAKING AN APPEAL FROM THE COUNTY TO THE DISTRICT COURT.** An appeal is not taken from the county to the district court by reason of the fact that it is "prayed and allowed." The appeal bond must be filed and approved before the appeal can be considered "taken,"—that is, perfected; and, if this be not done on the day on which judgment is rendered, the notice in writing must be served or the appeal may be dismissed. *Law v. Nelson*, 409.

52. **A MOTION TO DISMISS AN APPEAL IS NOT A GENERAL APPEARANCE.**— A motion confined to the single object of enforcing a statutory right, though not special in form, cannot be considered a waiver of such right, as by a general appearance for other purposes. *Ib.*

53. **ELECTION CONTESTS — CHANGE OF JUDGE AFTER TRIAL COMMENCED.**— A county election contest may be tried notwithstanding a change of county judges after the commencement of the trial; but in such case the trial must be *de novo*. *Clanton v. Ryan*, 419.

54. **WHEN RECOUNT OF BALLOTS SHOULD BE ORDERED.**— Where the cause of contest alleged is error, mistake, fraud, misconduct or corruption in the counting or declaring the result of an election, a recount of the ballots should be ordered as a matter of course upon request of the complaining party. *Ib.*

55. **THE BALLOTS MAY BE COMPARED WITH THE POLL LISTS.**— Upon the production of evidence tending to show error, mistake,

PRACTICE IN CIVIL ACTIONS—Continued.

fraud, malconduct or corruption on the part of the election boards or any of its members, in the matter of receiving, numbering, depositing or canvassing the ballots, or other illegal or irregular conduct in respect thereto, an inspection and comparison of the ballots with the poll lists should be allowed, in connection with the oral evidence in reference thereto. *Ib.*

56. EVIDENCE — MATERIAL AVERMENTS MUST BE PROVEN BY CONTESTOR.— In a county election contest, the statement of contestor that he is "an elector of the county" is a material averment, and, if denied by the answer, must be proved, or the contest as such must fail; nor is the contestor excused from producing evidence in support of such averment on the ground that other competent evidence is refused. *Ib.*

57. STATUTORY DEFENSES MUST BE PLEADED.— While the statute prohibits unlicensed persons from practicing law in the courts of record, and will not permit recovery of compensation in cases of violations of its provisions, yet, to be available, such defense must be pleaded. *Bachman v. O'Reilly*, 433.

58. APPEAL FROM COUNTY COURT TO DISTRICT COURT — WAIVER OF NOTICE BY GENERAL APPEARANCE.— The failure of a defendant to serve notice of his appeal as required by act of 1885 (Laws 1885, p. 159) is waived and cured by a full appearance by the appellee in the district court, and his participation in the action of the court in setting the cause down for trial *de novo*. Such action is a waiver of appellee's privilege to have the appeal dismissed or the judgment affirmed for failure to serve the required notice. *Robertson v. O'Reilly*, 441.

59. WHEN APPEAL DEEMED "TAKEN."— An appeal is taken, within the meaning of section 4 of the act of 1885, relating to appeals from county to district courts, when the appeal bond is filed and approved. *Straat v. Blanchard*, 445.

60. FAILURE TO SERVE NOTICE OF APPEAL IN TIME PRESCRIBED NOT CURED BY SUBSEQUENT NOTICE.— If appellee gives written notice to appellant that he will apply for dismissal of the appeal, or affirmance of the judgment, under said act, and follows it up with diligence, a subsequent notice by appellant that the appeal has been taken will not be allowed to defeat the statutory rights of appellee. *Ib.*

61. PLEADING— THE CHARACTER AND OBJECT OF AN ACTION DETERMINED BY THE COMPLAINT.— The allegations of a complaint determine the character and object of an action, and the plaintiff cannot be permitted, after the trial of a cause, to assume a wholly different object as the purpose of the action. *Hunt v. Mining Co.*, 451.

62. PRACTICE IN CIVIL CASES — COMPULSORY NONSUITS IN JURY TRIALS.— In a case tried to a jury the court may, on motion of defendant, enter a judgment of nonsuit when the plaintiff fails to introduce sufficient evidence to warrant a finding and judgment in his favor. *Guldager v. Rockwell*, 459.

63. LEGAL AND EQUITABLE REMEDIES — ACTION FOR DELIVERY OF TITLE DEEDS.— Where the principal ground of relief demanded by an action is the delivery of title deeds, muniments of title, or other written instruments, the value of which cannot with reasonable certainty be estimated, or where by reason of the insolvency of the defendants an action at law would not afford a full, adequate and complete remedy, an equitable action may be maintained. *Williams v. Carpenter*, 477.

PRACTICE IN CIVIL ACTIONS—*Continued.*

64. JURY TRIAL—ARGUMENT OF COUNSEL.—Counsel, in argument before the jury, may not comment upon matters of fact that are not in evidence. Subject to this general rule trial courts should, in the exercise of a reasonable discretion, favor the freest and fullest discussion. *Cook v. Doud*, 423.

65. MOTIONS FOR NEW TRIAL—DISCRETION OF TRIAL COURTS.—Trial courts are vested with a large discretion in determining motions for a new trial, and, unless there be an illegal exercise of such discretion or a clear abuse thereof, appellate courts refuse to interfere. *Ib.*

66. SAME—COMMENTS OF COUNSEL ON THE ABSENCE OF EXCLUDED EVIDENCE.—Where, in action for assault, evidence as to the relations of the parties prior to the assault has been excluded, it is within the discretion of the court to grant a new trial on account of remarks of defendant's counsel commenting on the absence of such evidence, and intended to prejudice the jury against plaintiff by producing the impression that there was great provocation to the assault. *Ib.*

67. CODE PLEADING—UNITING SEVERAL CAUSES OF ACTION IN THE SAME COUNT.—At common law the pleader might unite in one count several *indebitatus assumpsit* counts relating to the same subject-matter; and when the same course is pursued under the code, a general demurrer, when either count is good, must be overruled. *Campbell v. Shiland*, 491.

68. COMMON-LAW FORMS SUFFICIENT UNDER CODE AS TO ALLEGATIONS OF FACT.—A count in *indebitatus assumpsit*, framed substantially as required at common law, sufficiently complies with the code mandate as to allegations of fact. *Ib.*

69. EQUITABLE INTERVENTION NOT ADMISSIBLE—ACTS OF A PARTY TO A CONTRACT AGAINST WHICH A COURT OF EQUITY CANNOT RELIEVE.—Where a party has the means of acquiring full information respecting the nature and extent of the obligations he is about to assume in the execution of the contract, and ample time to acquaint himself therewith, in the absence of fraud or imposition by the other party to the contract, a court of equity cannot relieve him against over-generous, hasty and inconsiderate action on his part, however ill-advised and injurious to his interests they may be. *Wier v. Johns*, 493.

70. EQUITY CANNOT RELIEVE AGAINST ONE'S OWN LACHES.—A bill to set aside a conveyance of land donated by the plaintiff will not lie in the absence of fraud or mistake. *Ib.*

71. ACTION ON INSURANCE POLICY—PLEADINGS—ISSUES AND TESTIMONY.—Where an answer to the complaint averred that material statements in the plaintiff's application for insurance were untrue, a replication averring the plaintiff did not make or sign the application, but it was written without his knowledge by the agent of the company, the replication not being attacked by demurrer or motion, makes the responsibility for the application a material issue in the case, and entitles the insured to testify that he did not make or sign it, and to give his version of what actually took place between himself and the agent in reference to the application. *State Ins. Co. v. Taylor*, 499.

72. FACTS AND CIRCUMSTANCES NOT AVAILABLE AS A DEFENSE TO ACTION ON THE POLICY.—The claim that the policy has been avoided by a violation of the provision thereof that the house insured is occupied by the owner as a private residence, whereas it was occupied as an inn or boarding-house, is not available as a defense

PRACTICE IN CIVIL ACTIONS—Continued.

where it appears that the character of the house in this particular was not changed after the insurance was effected; that the company's agent was informed at the time of making the contract that persons were entertained at the house, more or less, and some boarders kept at times, etc., and that this use of the property in no way contributed to the loss. *Ib.*

73. THE STATUTE OF LIMITATIONS IS PLEADABLE TO ANY ONE OR ALL OF SEVERAL DISTINCT CAUSES OF ACTION, THOUGH EMBRACED IN A SINGLE COUNT.—When a complaint states several distinct causes of action—as for moneys expended for the use of defendant; for services performed by plaintiff as agent of the defendant; for the use of property by the defendant, etc.,—the statute of limitations may be pleaded to each or all of these several items, although all are joined in one count. *Gilpin v. Adams*, 512.

74. ACTION AGAINST INDORSER OF PROMISSORY NOTE, THE MAKERS NOT HAVING BEEN PROSECUTED TO INSOLVENCY.—In a suit against the indorser of a promissory note, no action having been instituted against the makers, the question whether a suit against the latter would have been wholly unavailing was properly submitted for the determination of the jury on the evidence, under section 7, chapter 9, General Statutes. *Castagno v. Carpenter*, 524.

75. PLEADING—AVERMENTS AND ISSUES.—The denial in a pleading of "legal notice * * * so as in any way to affect * * * the title derived," etc., does not put in issue the allegation of notice in the pleading answered. *Seaman v. Haw*, 536.

76. UNAVOIDABLE ACCIDENT AS A DEFENSE.—A defense based on unavoidable accident is not available where it already appears that the gross carelessness and negligence of the defendants contributed to the injury complained of. *Irrigating Co. v. House*, 549.

77. CHANGE OF VENUE—PREJUDICE OF JUDGE.—It is no ground for a change of venue in a civil case that the judge had formerly represented the people as prosecuting attorney in a criminal prosecution against defendant, and had been counsel for the plaintiff in a civil suit against him. *Karcher v. Pearce*, 557.

78. PLEADING INSUFFICIENT DEFENSES—REPLICATION UNNECESSARY.—A plea in an action on a written contract setting up a contemporaneous parol agreement inconsistent with the written contract is insufficient, and requires no replication. *Fitzgerald v. Burke*, 559.

79. SAME—DEFENSE OF RECOVERY AGAINST A JOINT OBLIGOR NO BAR WITHOUT ALLEGATION OF SATISFACTION OF JUDGMENT.—A plea that the contract sued on is joint and several, and that plaintiff has already recovered judgment against one of the joint and several obligors in another suit, but not alleging satisfaction of the judgment, is insufficient to constitute a defense. *Ib.*

80. NECESSARY PARTIES—WAIVER.—Objections for defect of parties must be raised either by demurrer or answer, and if not so raised they are waived. *Ib.*

81. DISPOSITION OF COURTS CONCERNING THE DECISION OF CONSTITUTIONAL QUESTIONS.—Courts usually decline to determine the constitutionality of a legislative enactment in a case where the record presents some other and clear ground upon which the judgment may rest. *De Votie v. McGerr*, 577.

82. CHARACTER OF EVIDENCE REQUIRED IN ELECTION CONTEST.—Mere rumors circulated and arguments advanced against particular candidates during political campaigns, however false or malicious, cannot affect the determination of such cases. The contestor

PRACTICE IN CIVIL ACTIONS—*Continued.*

must show that by the illegal casting or rejection of votes the result is different from what it otherwise would have been or the proceeding cannot be entertained. *Todd v. Stewart*, 236.

83. PRACTICE ON CORRECTION OF RECORD IN THE TRIAL COURT.—When leave is granted by the supreme court in a cause pending therein, to apply in the court below for a correction of its record, and the court below grants or refuses the application, the proceedings should be reported as an amendment to the transcript in the original cause pending in the supreme court. *Pleyte v. Pleyte*, 593.

84. LIABILITY OF SURETIES ON APPEAL BOND.—Unless plaintiff in error procures his *supersedeas* within thirty days after the date of the dismissal of his appeal, the sureties on his appeal undertaking become liable thereon as in case of affirmance. *McMichael v. Groves*, 540.

85. JOINT AND SEVERAL OBLIGATIONS.—Under the Civil Code, making joint instruments several also, the holder of a note who sues the maker and indorser as joint makers, dismisses as to the indorser without prejudice, and obtains judgment against the maker, may afterwards sue the indorser. *Hamill v. Ward*, 277.

86. AUTHORITY AND DUTY OF DISTRICT JUDGES TO HOLD COURTS FOR EACH OTHER.—The judges of the district court may hold courts for each other, and it is their duty so to do under certain circumstances. *Empire Land & Canal Co. v. Engley*, 289.

87. JUDGE'S AUTHORITY PRESUMED.—When a district judge holds a term of court outside his own district, his authority so to do, and to try the causes pending in such court, will be presumed unless the contrary appears. *Id.*

88. WHEN TWO OR MORE DISTRICT JUDGES CANNOT ACT TOGETHER.—Two or more district judges cannot lawfully sit and act together as a district court in this state, except as they sit in bank for the purposes specified in the act of April 2, 1887. *People v. Rucker*, 396.

89. PERSONAL JUDGMENT MAY BE ENTERED IN A MECHANIC'S LIEN PROCEEDING.—Under the act of 1883 a personal judgment may be rendered for the amount found due, though the right to a lien be not sustained. *Cannon and Dounce v. Williams*, 21.

90. EFFECT OF AN APPEAL FROM A DECREE.—The taking and perfecting of an appeal under the act of 1885 (since repealed) by the filing of the bond required by section 23, page 354, from a decree dissolving a temporary injunction, and ordering the receiver to deliver over possession of the property involved to the persons entitled thereto under the decree, operated as a *supersedeas* and stay of proceedings as to every part of the decree. The trial court being thus ousted of all power to enforce it, the receiver was not in contempt for declining to execute it pending the appeal. *Hurd v. People*, 207.

91. PLEADING—LEGAL EFFECT OF UNCONVERTED ALLEGATIONS.—Every material allegation of a complaint or answer, not controverted, must, for the purposes of the action, be taken as true. *Wilson v. Hawthorne*, 530.

92. JURISDICTION—HOW A JUDGMENT MAY BE IMPEACHED.—A judgment rendered without obtaining jurisdiction of the person may be impeached by a proceeding in equity, or by answer to an action, wherein equitable defenses are allowable. *Id.*

93. SAME—ALLEGATION OF MERITS.—An allegation of merits should be made in a complaint or answer denying the validity of a judgment as an earnest of good faith; but such allegation is not essential or traversable. *Id.*

PRACTICE IN CIVIL ACTIONS—Continued.

94. UNDER CODE PRACTICE A JOINT EQUITABLE DEFENSE MAY BE SUFFICIENT AS TO A SINGLE DEFENDANT THOUGH INSUFFICIENT AS TO OTHERS.—The rigid rule in common-law actions that a joint plea insufficient as to one defendant is insufficient as to all is not applicable to an equitable defense under the Colorado Code of Procedure. *Quere*, whether a judgment rendered against several parties may be maintained against those over whom jurisdiction was regularly obtained, when set aside as to others for want of jurisdiction. *Ib*.

PRACTICE IN SUPREME COURT:

1. EXERCISE OF ORIGINAL JURISDICTION BY SUPREME COURT.—It is the settled practice of the supreme court not to exercise its original jurisdiction except in cases *publici juris*, or in cases where it is shown that a refusal to take jurisdiction would practically amount to a denial of justice. *In re Rogers*, 18.

2. THE FINDINGS OF A REFEREE MUST BE EXCEPTED TO.—The correctness of findings of fact returned by a referee will not be inquired into by the supreme court unless exceptions thereto be taken in the court below. *Cannon et al. v. Williams*, 21.

3. PRESERVING OBJECTIONS TO EVIDENCE AND INSTRUCTIONS.—Objections and exceptions relating to evidence and instructions given at the trial cannot be considered on error or appeal unless properly preserved in the record filed in this court. *Brahoney et al. v. Railroad Co.* 27.

4. OBJECTIONS TO PLEADINGS.—Objections to a complaint on the ground of misjoinder of parties, or that several causes of action are improperly united, and other like objections, if not taken by demurrer or answer, will be deemed waived. *Ib*.

5. JUDGMENT ON CONTRACT—WHEN APPEAL UNAVAILING.—Where judgment is regularly entered upon a personal contract, and upon sufficient evidence to support it, and no evidence is produced in support of the defense relied on, an appeal from the judgment is unavailing. *McKenzie v. McMillen*, 50.

6. ISSUES OF FACT—PROVINCE OF JURY.—The weight of the evidence and the credibility of the witnesses are matters of which the jury are the proper judges. *Simonton v. Rohn*, 51.

7. INSTRUCTIONS SUBSTANTIALLY CORRECT NOT CAUSE FOR REVERSAL.—Though some of the instructions, separately considered, be not as perfect and accurate in form as they might be, nevertheless, if the charge as a whole fairly submits the questions at issue for the determination of the jury upon the evidence, the verdict should not be disturbed. *Ib*.

8. PRACTICE IN SUPREME COURT IN CASES IN WHICH ERROR OCCURRED IN THE TRIAL BELOW.—It is not the usual practice of this court to substitute its own findings in the place of the findings of the trial court upon matters of fact based upon conflicting evidence given orally in open court; but, where the conclusions of law are erroneous, the general rule is to reverse the judgment, and remand the cause for a new trial. *Rico R. & M. Co. v. Musgrave*, 79.

9. INSTRUCTIONS—IN ORDER TO HAVE SAME REVIEWED THE ENTIRE CHARGE MUST BE EMBRACED WITHIN THE TRANSCRIPT.—In construing a charge to the jury the entire charge must be considered, and where appellant does not embrace within the transcript the entire charge given, the supreme court cannot determine whether or not the jury were misled by the charge to which exception is taken. *McQuown v. Cavanaugh*, 188.

PRACTICE IN SUPREME COURT—*Continued.*

10. APPEAL—WEIGHT OF EVIDENCE.—Where the questions in a case are purely of fact, the supreme court will not interfere with the verdict of the jury when there is evidence to warrant its findings. *Hallock v. Stockdale*, 198.

11. ELECTION CONTESTS—PLEADINGS AND PRACTICE IN SUPREME COURT.—A general averment of election frauds or the intimidation of voters is insufficient; under the rules of this court in relation to election contests, proper ultimate facts must be pleaded as in other cases. *Todd v. Stewart*, 286.

12. CHARACTER OF EVIDENCE REQUIRED IN SUCH CASES.—Mere rumors circulated and arguments advanced against particular candidates during political campaigns, however false or malicious, cannot affect the determination of such cases. *Ib.*

13. WHAT CONTESTOR MUST SHOW.—If the contestor does not show that by reason of the illegal casting or rejection of votes the result is different from what it would otherwise have been, the proceeding should not be entertained. *Ib.*

14. DECREE IN EQUITY—CONFLICTING EVIDENCE.—Where the evidence in the trial court is conflicting, but sufficient to sustain the findings and decree, the supreme court will not interfere. *Riley v. Riley*, 290.

15. APPEALS IN FORCIBLE ENTRY AND DETAINER CASES.—Appeals to the supreme court in forcible entry and detainer cases are allowable only where the judgment appealed from amounts, exclusive of costs, to \$100, or relates to a franchise or freehold. *Crane v. Farmer*, 294.

16. JOINING IN ERROR WILL NOT CONFEE JURISDICTION.—Where the judgment sought to be appealed from is not appealable, consent by joining in error is ineffectual to save the appeal. *Ib.*

17. ORAL CHARGE TO JURY BY CONSENT, AND INSUFFICIENT EXCEPTIONS THERETO.—Where, by consent, the charge to the jury is given orally, an exception to the "giving of said charge, and each several proposition of law therein contained," without calling the judge's attention to any particular error, is insufficient to bring up for review alleged erroneous portions of the charge. *Keith v. Wells*, 321.

18. NO MOTION BELOW FOR NEW TRIAL, AND IMPERFECT BILL OF EXCEPTIONS.—Where only part of the evidence given at the trial is preserved in the bill of exceptions and a new trial was not asked for in the court below, the supreme court can review only errors of law occurring at the trial to which exceptions were duly reserved. *Ib.*

19. BILL OF EXCEPTIONS—STIPULATIONS OF COUNSEL NOT EQUIVALENT THERETO.—The supreme court cannot review the evidence unless the same is incorporated into the record. The stipulation of counsel that the testimony as taken by the court stenographer shall be the record in the case does not supply the place of a bill of exceptions duly authenticated and certified. *McKenzie v. Ballard*, 426.

20. PRACTICE IN SUPREME COURT—A JOINT APPEAL NOT MAINTAINABLE UNLESS EACH APPELLANT ENTITLED TO AN APPEAL.—Under the act of 1889, page 77, providing for appeals from courts of record to the supreme court, a joint appeal will not lie in any cause unless as to each appellant there exists a final judgment or decree amounting to the sum of \$100, exclusive of costs, or relating to a franchise or freehold. When, therefore, the only judgment rendered against a portion of the defendants is a judgment for costs, a joint appeal will be dismissed on motion of the appellee. *Diamond Tunnel, etc. Co. v. Faulkner*, 438.

PRACTICE IN SUPREME COURT—Continued.

21. **DISMISSAL OF APPEALS — IF THE MOTION THEREFOR CONTAIN SUFFICIENT GROUNDS, THAT IT ALSO RECITE INSUFFICIENT GROUNDS CONSTITUTES NO WAIVER OF APPELLEE'S RIGHTS.**—The appellee does not waive his right to have the appeal dismissed by asserting in his motion as an additional reason therefor that the purported transcript is scandalous and irregular, and cannot be treated as a transcript under the rules of the court. *Ib.*

22. **OBJECTIONS NOT RAISED BELOW.**—When there is sufficient legal evidence to support the judgment it cannot be disturbed upon appeal because joint and several demands were improperly commingled at the trial, no objection for this reason having been interposed. *Ayres v. Shields*, 475.

23. **WAIVER OF OBJECTIONS — PRACTICE IN SUPREME COURT.**—When opposing counsel refrains from objecting at the time to improper argument, and the trial court afterwards refuses relief, reviewing tribunals, invoking a rule analogous to that of estoppel, frequently decline also to interfere. *Cook v. Doud*, 483.

24. **MOTIONS FOR NEW TRIAL — DISCRETION OF TRIAL COURTS.** Trial courts are vested with a large discretion in determining motions for a new trial, and unless there be an illegal exercise of such discretion, or a clear abuse thereof, appellate courts refuse to interfere. *Ib.*

25. **THE STATUTE OF LIMITATIONS IS PLEADABLE TO ANY ONE OR ALL OF SEVERAL DISTINCT CAUSES, THOUGH EMBRACED IN A SINGLE COUNT.**—When a complaint states several distinct causes of action—as for moneys expended for the use of defendant; for services performed by plaintiff as agent of the defendant; for the use of property by the defendant, etc.—the statute of limitations may be pleaded to each or all of these several items, although all are joined in one count. *Gilpin v. Adams*, 512.

26. **INSTRUCTIONS TO JURY — APPELLANT CANNOT COMPLAIN OF ERROR WHICH DOES NOT PREJUDICE.**—Where the appellant assigned error upon an instruction given at the trial, and it appears that the portion of the instruction applicable to the facts of the case stated the law correctly, and that the portion complained of could not have been prejudicial to the appellant in any event, it affords no ground for reversal. *Castagno v. Carpenter*, 524.

27. **PRACTICE IN SUPREME COURT — EFFECT OF A DISMISSAL OF A WRIT OF ERROR OR AN APPEAL UNDER DIFFERENT STATUTES.**—Prior to 1887 the dismissal of a writ of error or an appeal by the supreme court, without express affirmance of the judgment, operated, regardless of the ground relied on, as a nonsuit in the former instance and a discontinuance of the particular appellate proceeding in the latter. *McMichael v. Groves*, 510.

28. **SAME.**—But under the statute of 1837, in causes brought up for review from the district court, unless the order of dismissal expressly reserves the right, the judgment stands affirmed, and a further review, either by appeal or by error, cannot be had. *Ib.*

29. **DISMISSAL OF APPEAL WITHOUT PREJUDICE.**—When an appeal is dismissed without prejudice, appellant's right to a writ of error at any time within three years from the rendition of judgment remains. *Ib.*

30. **REVIEW — WEIGHT OF EVIDENCE.**—Where the evidence was conflicting, and the findings of the trial court were not manifestly against the weight thereof, the judgment will not be disturbed. *Wendling Cattle & Land Co. v. Woodburn*, 544.

31. **PRACTICE IN SUPREME COURT — APPEAL — ASSIGNMENT OF ERRORS — EXCEPTIONS TO INSTRUCTIONS.**—Where the verdict is

PRACTICE IN SUPREME COURT—Continued.

sustained by the evidence, and no errors assigned to the admission or rejection of testimony, formal exceptions not being reserved to the instructions, and the charge being substantially correct, the judgment will be affirmed. *Gutshall v. Helm*, 543.

82. PRACTICE WHEN FINDING UNSUPPORTED.—Where the evidence does not tend to support the finding, the judgment will be reversed as being against the evidence. *Cross v. Kistler*, 571.

83. REHEARING—CONSTITUTIONALITY OF SUPREME COURT COMMISSION ACT.—The constitutionality of the act providing for a supreme court commission is not necessarily involved upon the petition for a rehearing of a cause which had been referred to the commission in pursuance of said act. *De Votie v. McGerr*, 577.

84. DISPOSITION OF COURTS CONCERNING THE DECISION OF CONSTITUTIONAL QUESTIONS.—Courts ordinarily decline to determine the constitutionality of a legislative enactment in a case where the record presents some other and clear ground upon which the judgment may rest. *Ib.*

85. THE SUPREME COURT NOT AUTHORIZED TO ADOPT, PRO FORMA, THE OPINIONS OF THE SUPREME COURT COMMISSIONERS.—The supreme court alone can promulgate opinions and render judgments, and its duty is not discharged by the adoption *pro forma* of the conclusions of the supreme court commission. *Ib.*

86. RIGHT OF ORAL ARGUMENT IN SUPREME COURT.—The privilege of being heard orally before the supreme court prior to final judgment is a right which, though subject to reasonable regulation, cannot, under our practice, be denied to any party litigant making seasonable application therefor. *Ib.*

87. PRACTICE ON APPLICATION FOR CORRECTION OF RECORD.—An application to correct the record in a cause pending in the supreme court does not lay a foundation for a new proceeding on error. When leave is given to apply in the court below for such correction and the court below grants or refuses the application, the proceedings should be reported as an amendment to the transcript in the original cause. *Pleyte v. Pleyte*, 593.

PRINCIPAL AND AGENT:

1. WHEN CONTRACT ADMISSIBLE AGAINST A SUCCESSOR TO BUSINESS.—Where a man in trade hired an assistant at a stipulated *per diem*, and afterwards, as agent of his wife, who succeeded to the property and business, continued to allow and pay him at the same rate for his services; but the wife, on assuming personal supervision, refused to allow and pay him at the same rate for the time then due, claiming that the contract made with the husband was not binding on her, it is proper for the plaintiff to prove the original contract of hiring. *McQuown v. Cavanaugh*, 188.

2. ACTS OF INSURANCE AGENTS CHARGEABLE TO THE INSURANCE COMPANY.—The employment by an insurance company of an agent to solicit, receive and forward to the company applications for insurance, to receive and forward policies, and to collect premiums, makes him the agent of the company for the performance of these duties, and any misstatements, errors or omissions resulting from his fraud, neglect or carelessness are chargeable to the company, and not to the insured. *State Insurance Co. v. Taylor*, 499.

PROCESS: See WRITS.**PROMISSORY NOTES AND BILLS OF EXCHANGE:**

1. FRAUDULENT ASSIGNMENT.—The assignee of a promissory note who pays no consideration therefor, and participates in the

PROMISSORY NOTES AND BILLS OF EXCHANGE — *Continued.*
fraudulent intent of his assignor, is not entitled to the immunity of *bona fide* assignees for value, before due, of commercial paper. *Hamill v. First Nat. Bank*, 1.

2. **PROMISSORY NOTES — LEGAL EFFECT OF THEIR ASSIGNMENT.**
The assignment of a promissory note vests in the assignee both the note and the security originally given in connection therewith. *Smith v. Brunk*, 75.

3. **CONTRACTS — CONSIDERATION.** — A promissory note was given by defendant solely as collateral security for a debt due plaintiff on account. Before the giving of the note this account, together with a trust-deed securing it, had been assigned to a third person. Defendant was ignorant of such assignment, and would not have executed the note had he known of it. After the assignment, and before the commencement of suit on the note, the assignee received payment in full of the account in question. The note had not been negotiated. *Held*, that plaintiff could not recover, there being no consideration for the note. *Johnson v. Mitchell*, 227.

4. **CONTRACTS — JOINT AND SEVERAL OBLIGATIONS.** — Under the statute and the Civil Code making joint instruments several, also (Gen. Stat. § 1834; Code, § 13), the holder of a note who sues the maker and indorser as joint makers, and dismisses, as to the indorser, without prejudice, afterwards obtaining judgment against the maker, may then sue the indorser. *Hamill v. Ward*, 277.

5. **ACTION AGAINST INDORSER OF PROMISSORY NOTE, THE MAKERS NOT HAVING BEEN PROSECUTED TO INSOLVENCY.** — In a suit against the indorser of a promissory note, no action having been instituted against the makers, the question whether a suit against the latter would have been wholly unavailing was properly submitted for the determination of the jury on the evidence, under section 7, chapter 9, General Statutes. *Castagno v. Carpenter*, 524.

6. **NEGOTIABLE INSTRUMENTS ASSIGNED TO BONA FIDE PURCHASERS.** — Where A. indorses drafts in blank to B. for collection, and B., wrongfully assuming to be the owner, sells and disposes of them to C., who has no knowledge of the want of ownership in B., C. is invested with good title. He is not chargeable with notice of ownership in A. by the fact that in B.'s letter, transmitting the drafts to him, they were described as "A.'s acceptances." *Coors v. German Nat. Bank*, 202.

PUBLIC DOMAIN: See ADVERSE CLAIMS.

PUBLIC LANDS: See ADVERSE CLAIMS.

RATIFICATION:

1. **A FRAUDULENT SALE OF REAL ESTATE MAY BE RATIFIED BY THE CONDUCT OF THE PURCHASER.** — Where purchasers of mining property enter into possession, and, after finding that they have been deceived by misrepresentations of the seller, fail to either rescind the contract of purchase or affirm it, and bring an action for the deceit, but continue to exercise acts of ownership, they are estopped from setting up the misrepresentations as a defense to an action to enforce the contract. *Butler v. Rockwell*, 125.

2. **AFFIRMANCE OF TRANSFER OF STOCK IN TRADE MADE BY AN INSOLVENT FIRM.** — Where an insolvent firm has transferred all its property, taking notes in payment, its creditors who have not attempted to have the sale set aside, but have treated it as legitimate by proceeding against the purchasers by attachment for the money due on the notes, cannot question the *bona fides* of the sale. *Sickman v. Abernathy*, 174.

REDEMPTION:

NO REDEMPTION FROM JUDICIAL SALE OF PERSONAL PROPERTY.—The right of redemption from a judicial sale of personal property does not exist in this state. *Conway v. John*, 30.

REFORMING INSTRUMENTS: See EQUITY, 1.**REHEARING:**

1. **CONSTITUTIONALITY OF SUPREME COURT COMMISSION ACT.**—Upon a petition for a rehearing of a cause which had been referred to the supreme court commission, under the act providing for such commission, the constitutionality of said act is not necessarily involved. *De Votie v. McGerr*, 577.

2. **CONSTITUTIONAL QUESTIONS RELATING TO LEGISLATIVE ENACTMENTS — DISPOSITION OF COURTS.**—Courts ordinarily decline to determine the constitutionality of legislative enactments in cases where the records present other and clear grounds upon which their judgments may rest. *Id.*

REPLEVIN:

SURETIES NOT ENTITLED TO THE POSSESSION OF ATTACHED PROPERTY — REPLEVIN.—When the release of attached property has been procured by giving a forthcoming bond, the sureties upon such bond are not by reason of their suretyship entitled to the possession of the property, and cannot therefore maintain the action of replevin. *Stevenson v. Palmer*, 565.

RIGHT OF WAY: See EMINENT DOMAIN, 1, 2.**SALES:**

1. **TRANSFER OF STOCK BY INSOLVENT FIRM — RATIFICATION BY CREDITORS.**—Where an insolvent firm has transferred all its property, taking notes in payment, its creditors, who have not sought to have the sale set aside, but have acquiesced in it and treated it as legitimate by proceeding against the purchasers by attachment for the money supposed to be due on the notes, cannot question the *bona fides* of the sale. *Sickman v. Abernathy*, 174.

2. **SALE AND DELIVERY OF CHATTELS BY MERCHANT IN FAILING CIRCUMSTANCES.**—Where a merchant in failing circumstances transfers and delivers to a creditor, in liquidation of his claim, his entire stock in trade and fixtures, and an hour or two afterwards the latter appoints him his agent to sell the stock and close up the business, redelivering to him the possession for that purpose, whereupon the goods are attached at the suit of another creditor of the debtor, a jury is justified in finding that the sale was not accompanied by an immediate delivery and followed by an actual and continued possession, as required by section 14 of the statute of frauds (Gen. St. p. 509). *Baur v. Beall*, 383.

3. **CONTRACT FOR SALE OF CHATTELS TO BE DELIVERED NOT A FRAUDULENT CONVEYANCE.**—A contract by merchants to furnish supplies and money to mine owners, and to receive therefor ore as it is mined, is not a present absolute sale of the ore, and therefore not within the statute declaring that every sale of chattels, unless accompanied by an immediate delivery and a continued change of possession, shall be conclusively presumed fraudulent as against creditors of the vendor, although the contract contains the words "sells, assigns and transfers." *Finding v. Hartman*, 586.

4. **ATTACKING JUDICIAL SALE — INADEQUACY OF PRICE.**—Ordinarily inadequacy of price is not alone sufficient cause for setting aside a judicial sale, particularly of personal property of fluctuating value. *Conway v. John*, 30.

SALOONS AND DRAM-SHOPS: See **TIPPLING HOUSES.**

SET-OFF:

1. **WHEN PLEA OF SET-OFF IS NOT AVAILABLE AGAINST A PARTNERSHIP DEMAND.**—As a general rule debts due from one member of a partnership cannot be set off in a suit to collect claims or accounts belonging to the firm. *Hamill v. First Nat. Bank*, 1.

2. **SAME—EFFECT GIVEN TO AN AGREEMENT FOR SET-OFF.**—But if it can be shown that all parties concerned, including members of the partnership, expressly or impliedly agreed that a debt owing by one of the partners may be set off against a debt owing to the firm, or *vice versa*, effect will be given to the agreement. *Ib.*

3. **PURCHASE OF COLLATERAL SECURITIES.**—The purchase by a debtor of his own contract obligations from one to whom they had been assigned by his creditor as collateral security, does not invest the purchaser with title thereto so as to discharge him from his obligations, but merely entitles him to offset the amount actually paid for the transfer in an action brought against him by his creditor upon said obligations. *Moffatt v. Corning*, 104.

STATUTE OF FRAUDS: See **STATUTES AND STATUTORY CONSTRUCTION**, 9, 21, 22, 85..

STATUTE OF LIMITATIONS: See **LIMITATION OF ACTIONS.**

STATUTES AND STATUTORY CONSTRUCTION:

1. **CONSTRUCTION OF MECHANIC'S LIEN STATUTES, AND ENFORCEMENT OF LIENS—HARMLESS MISTAKES.**—Mechanic's lien statutes are to be liberally construed, but there must be a substantial compliance with all the material requirements of the law. Harmless mistakes of claimants do not destroy the lien. *Cannon and Dounce v. Williams*, 21.

2. **CONTENTS OF THE NOTICE REQUIRED TO BE FILED WITH COUNTY CLERK.**—Stating, in the notice of lien, the balance due is not a compliance with the statute requiring "an abstract of indebtedness showing the whole amount of debt, the whole amount of credit, and the balance due or to become due the claimant." *Ib.*

3. **PERSONAL JUDGMENT.**—Under the act of 1883, a personal judgment may be rendered for the amount found due, though the right to a lien be not sustained. *Ib.*

4. **CONSTRUCTION OF MINER'S LIEN STATUTE.**—The legislation of this state upon the subject of mechanics' and miners' liens should receive a liberal construction. *Rico R. & M. Co. v. Musgrave*, 79.

5. **CONSENT OF CO-TENANTS NECESSARY TO THE IMPROVEMENT OF THE JOINT PROPERTY AT EXPENSE OF ALL.**—The law does not invest one tenant in common with authority to improve or develop real property at the expense of his co-tenants, without their authority and consent. *Ib.*

6. **CONSTRUCTION OF THE CLAUSE, "A CLAIM AND COLOR OF TITLE MADE IN GOOD FAITH."**—Under General Statutes, section 2186, requiring "a claim and color of title made in good faith" as a ground of adverse possession, one cannot hold adversely to another when he knows that his entry in the land-office has been set aside or disregarded, and a patent has issued to the person against whom he claimed an adverse holding. *Arnold v. Woodward*, 164.

7. **CONSTRUCTION OF STATUTES AND OF CONTRACTS—APPLICATION THERETO OF THE PRINCIPLE OF NOSCITUR A SOCIIS** (Civil Code 1883, § 95, subd. 14).—The code provision that "in all actions brought upon overdue promissory notes, bills of exchange, other instruments for the direct payment of money, and upon book-

STATUTES AND STATUTORY CONSTRUCTION — *Continued.*

accounts, the creditor may have a writ of attachment issue upon complying with the provisions of this section" (Civil Code 1883, § 95, subd. 14), in so far as it relates to written contracts is to be limited to contracts of the nature of those specified therein. *Hurd v. McClellan*, 213.

8. A WRIT OF ATTACHMENT MAY NOT ISSUE UPON AN APPEAL BOND.—An appeal bond conditioned that if the defendant shall duly prosecute his appeal and pay the judgment if the same shall be affirmed, then the obligation shall be void, otherwise it shall remain in full force, is not a written instrument for the direct payment of money, and will not sustain an attachment. *Ib.*

9. CONSTRUCTION OF STATUTORY PROVISION AUTHORIZING THE MORTGAGOR TO RETAIN POSSESSION.—STATUTE OF FRAUDS.—The statutory provision that the mortgage shall be "good and valid from the time it is so recorded, for a space of time not exceeding two years, notwithstanding the property mortgaged * * * may be left in the possession of the mortgagor," does not authorize the mortgagor to retain it for that period of time unless it be so stipulated in the mortgage. Suffering mortgaged property to remain in possession of the mortgagor after default in payment is a fraud *per se*, and renders the mortgage void as to creditors both under the chattel-mortgage act and the statute of frauds. *Atchison v. Graham*, 217.

10. CONSTRUCTION OF STATUTES — LEGISLATIVE INTENT INDICATED BY CHANGE OF LANGUAGE IN AMENDMENT.—Where the language of a statute is radically changed by a subsequent amendment, such change indicates a change of intent on the part of the legislature. *Heinssen v. State*, 223.

11. CONSTRUCTION OF AMBIGUOUS STATUTES — LEGISLATIVE INTENT TO PREVAIL.—Although the provisions of an amendment to a law are ambiguous, it is the duty of the courts to discover, if possible, the intention of the legislature in framing the same, and to give the amended act such construction as will best effectuate the change intended. *Ib.*

12. AUTHORITY OF CITY COUNCIL OF DENVER TO LICENSE TIPPLING-HOUSES SUBJECT TO CONDITIONS.—The authority of the city council of the city of Denver to license, tax and regulate tippling-houses, dram-shops, etc., is subject to the following, among other, conditions: (1) That the license rate to be charged shall not be less than certain minimum fees specified by the statute; (2) that the power granted shall only be exercised subject to the general law of the state regulating the manner of conducting the business by the licensee. *Ib.*

13. KEEPING OPEN TIPPLING-HOUSE ON SUNDAY.—STATUTE APPLICABLE TO CITY OF DENVER UNDER PRESENT CHARTER.—By the general law of the state the keeping open of a tippling house on the Sabbath day or night is made a criminal offense, punishable by fine or imprisonment; and the fact that such house is situate in the city of Denver will not avail as a defense under the present city charter. *Ib.*

14. EFFECT OF THE REPEAL OF A REPEALING ACT.—When any act or part of an act is repealed, it is not revived by a subsequent repeal of the repealing act. *Ib.*

15. SUSPENSION OF A GENERAL LAW BY A CITY ORDINANCE — REPEAL OF THE ORDINANCE.—When the suspension of a general law within a municipality results from a city ordinance passed in pursuance of a special charter, the repeal of the ordinance will leave the general law in force within the city. *Ib.*

STATUTES AND STATUTORY CONSTRUCTION — *Continued.*

16. CLASSIFICATION OF CLAIMS AGAINST ESTATES OF DECEASED PERSONS.— The statutory provisions relating to the classification of claims against the estates of deceased persons have no application to trust funds held by a deceased person at the time of his death, where the relation of debtor and creditor between him and the owner of the fund never existed. *First Nat. Bank v. Hummel*, 259.

17. CONTRACTS — JOINT AND SEVERAL OBLIGATIONS.— Under Civil Code, section 13, and General Statutes, section 1834, making joint instruments several also, the holder of a note who sues the maker and indorser as joint makers, dismisses as to the indorser, without prejudice, and obtains judgment against the maker, may afterwards sue the indorser. *Humill v. Ward*, 277.

18. PARTITION OF REAL ESTATE — NECESSARY PARTIES — PLEADINGS.— In a proceeding under the statute for the partition of real estate it is only necessary, at least in the first instance, to make those persons parties who are interested in the property as joint tenants, tenants in common or coparcenary. Lessees having no definite or subsisting leasehold interest in the premises sought to be partitioned are not necessary parties, and an answer which avers that a lease had been granted "prior to the commencement of this suit," and that the lessees "have been in possession," etc., without disclosing the terms, duration or continued existence of the lease, is insufficient to require the supposed lessees to be made parties. *Jordan v. McNulty*, 280.

19. REFUSAL OF COMMISSIONER TO ACT — SUBSTITUTION OF ANOTHER WITHOUT NOTICE.— Where a commissioner appointed by the court under the provisions of the statute to make partition declines to serve, the court may substitute another person in his place without giving notice to the parties. If the appointee be objectionable by reason of coming within any of the exceptions enumerated in the statute, the objection may be raised after the appointment, or it may be interposed as an objection to the report before its confirmation. *Ib.*

20. IRREGULARITIES WHICH MAY BE CURED — FAILURE IN THE FIRST INSTANCE TO TAKE THE OATH NOT A REVERSIBLE ERROR.— Where the commissioners appointed to make partition of lands view the premises before one of them has taken the oath prescribed by the statute, and their report is filed, which for some reason is not confirmed, and afterwards the commissioner takes the oath before the filing of the final report, the filing of the first report does not render the commission *functus officio*, nor is the failure to take the oath before viewing the premises a reversible error. *Ib.*

21. THE STATUTE OF FRAUDS NOT INVOLVED IN ACTION FOR SETTLEMENT OF MINING PARTNERSHIP.— When the business of a partnership organized to lease and operate a mine during a limited period for the sole purpose of making a profit through the extracting and marketing ores therefrom has been terminated, in an action brought by one of the partners to settle the partnership accounts and distribute the partnership profits and other assets, no interest in realty is involved. In such case the right to a settlement in no way depends upon the legal status of realty under the statute of frauds. *Meagher v. Reed*, 335.

22. SALE AND DELIVERY OF CHATTELS — STATUTE OF FRAUDS.— Where a merchant in failing circumstances transfers and delivers to a creditor, in liquidation of his claim, his entire stock in trade and fixtures, and an hour or two afterwards the latter appoints him his agent to sell the stock and close up the business, redelivering to him the possession for that purpose, whereupon the goods

STATUTES AND STATUTORY CONSTRUCTION — *Continued.*

are attached at the suit of another creditor of the debtor, a jury is justified in finding that the sale was not accompanied by an immediate delivery and followed by an actual and continued possession, as required by section 14 of the statute of frauds (Gen. St. p. 509). *Baur v. Beall*, 383.

23. THE CONSTITUTIONAL REQUIREMENT RESPECTING THE TITLES OF ACTS MANDATORY.—The constitutional provision against the passage of bills containing matters not embraced in their titles is mandatory, the purpose being to avoid fraud and surprise in the enacting of laws. A further important end is attained in avoiding surprise to those over whom the laws become operative. *In re Breene*, 401.

24. TEST OF CONSTITUTIONALITY.—A matter is clearly indicated by the title of a bill when it is clearly germane to the subject mentioned therein. *Ib.*

25. PENAL PROVISION OF REVENUE ACT RELATING TO THE LOANING OR USING OF STATE FUNDS UNCONSTITUTIONAL.—Under a title providing "for the assessment and collection of revenue" was placed a provision making it a crime for the state treasurer to "loan out or in any manner use for private purposes" the public funds in his hands; *held*, that the penal provision was unconstitutional because not clearly expressed in the title. *Ib.*

26. CRIMINAL LAW—CONSTITUTIONAL TEST WHETHER A CRIMINAL OFFENSE IS A FELONY OR A MISDEMEANOR.—The constitutional test whether an offense not capital is to be deemed a felony or a misdemeanor is made to depend on whether the same is punishable by imprisonment in the penitentiary or in the county jail. *Brooks v. People*, 413.

27. WHERE THE STATUTE IS SILENT AS TO THE PLACE OF IMPRISONMENT, IT MUST BE IN THE COUNTY JAIL—SECTION 2594, GENERAL STATUTES, UNCONSTITUTIONAL.—A person convicted of a conspiracy to defraud under section 811, General Statutes of 1883, which does not prescribe the place of imprisonment, was erroneously sentenced to imprisonment in the penitentiary. Section 2594 of the General Statutes, which provides that where the term of imprisonment exceeds six months the prisoner shall be confined in the penitentiary, is unconstitutional and void, for the reason that the subject of the act in which it occurs is not clearly expressed in the title thereof, as required by article 5, section 21, of the constitution. *Ib.*

28. PRACTICE IN SUPREME COURT—A JOINT APPEAL IS NOT MAINTAINABLE UNLESS EACH APPELLANT IS ENTITLED TO AN APPEAL.—Under the act of 1889, page 77, providing for appeals from courts of record to the supreme court, a joint appeal will not lie in any cause, unless as to each appellant there exists a final judgment or decree amounting to the sum of \$100, exclusive of costs, or relating to a franchise or freehold. Where the only judgment rendered against a portion of the defendants is a judgment for costs, a joint appeal will be dismissed on motion of the appellee. *Diamond Tunnel, etc. Co. v. Faulkner*, 433.

29. WHEN AN APPEAL IS DEEMED "TAKEN."—An appeal from the district court to the county court is *taken*, within the meaning of section 4 of the act of 1885, relating to appeals from the county courts to the district courts, when the appeal bond is filed and approved. *Straat v. Blanchard*, 445.

30. AN ACTION IN SUPPORT OF AN ADVERSE CLAIM NOT MAINTAINABLE UNLESS THE ADVERSE BE FILED WITHIN THE SIXTY DAYS OF PUBLICATION.—When an application is filed in a United

STATUTES AND STATUTORY CONSTRUCTION — *Continued.*

States land-office for a patent to mining premises, and notice of the application is published as required by the United States Statutes, a suit to contest the rights of the applicant cannot be maintained under section 237 of the Civil Code, unless the plaintiff shall have filed his adverse claim to the premises in said land-office, as provided by section 2326, Revised Statutes of the United States, within the sixty days of publication required to be made by the register, upon filing the application for patent. Such action cannot be maintained when the adverse claim is not filed until sixty-two days after the commencement of the publication. *Hunt v. Mining Co.* 451.

81. EXEMPTIONS — THE STATUTE APPLIES TO MERCHANTS AND SHOP-KEEPERS. — Section 32, chapter 6C, of the General Statutes, which exempts from levy and sale on execution or attachment the tools, implements, working animals, books and stock in trade, not exceeding \$300 in value, of any mechanic, miner or other person not being the head of a family, used and kept for the purpose of carrying on his trade and business, covers and includes the stock in trade of a merchant or shop-keeper kept for the purpose of sale, to the extent specified in the statute, the same as the property of other persons. *Martin v. Bond*, 466.

82. PRACTICE IN SUPREME COURT — EFFECT OF A DISMISSAL OF A WRIT OF ERROR OR AN APPEAL UNDER DIFFERENT STATUTES. Prior to 1887 the dismissal of a writ of error or an appeal by the supreme court, without express affirmance of the judgment, operated, regardless of the ground relied on, as a nonsuit in the former instance and a discontinuance of the particular appellate proceeding in the latter. *McMichael v. Groves*, 540.

83. SAME. — But under the statute of 1887, in causes brought up for review from the district court, unless the order of dismissal expressly reserves the right, the judgment stands affirmed, and a further review, either by appeal or by error, cannot be had. *Ib.*

84. DISMISSAL OF APPEAL WITHOUT PREJUDICE. — When an appeal is dismissed without prejudice, appellant's right to a writ of error at any time within three years from the rendition of judgment remains. *Ib.*

85. CONTRACT FOR A SALE OF CHATTELS TO BE SUBSEQUENTLY DELIVERED NOT A FRAUDULENT CONVEYANCE. — A contract under which a firm of merchants are to furnish supplies and money to the owners of a mine, and in return are to receive ore as mined, is not a present absolute sale of the ore, though it contains the words "sells, assigns and transfers;" and it is therefore not within the provision of the General Statutes of Colorado, chapter 43, section 14, declaring that every sale of chattels, unless accompanied by an immediate delivery and a continued change of possession, shall be conclusively presumed fraudulent as against creditors of the vendor. *Finding v. Hartman*, 596.

86. WAIVER OF STATUTORY OBJECTION TO CONTRACT. — It is no defense to an action for delivery of title deeds, after payment and acceptance of the purchase money, that the contract of sale was not in writing, and was therefore void. *Williams v. Carpenter*, 477.

87. BONA FIDE PURCHASERS NOT LIABLE TO GARNISHMENT AFTER PAYMENT OF PURCHASE MONEY. — The right of a creditor to garnish property, effects, etc., of a debtor, in the possession and charge, or under the control, of a third person, under General Statutes, section 1554, does not apply as against purchasers, without fraud, of the property of an insolvent partnership, who have paid the purchase money. *Sickman v. Abernathy*, 174.

STATUTES AND STATUTORY CONSTRUCTION — *Continued.*

38. ATTACHMENT OF EXEMPT PERSONAL PROPERTY. — When a debtor has only the amount, kinds and value of property covered by the exemption statute, a levy upon and sale thereof is absolutely illegal, unless the exemption be waived. In such case it is the duty of the officer to set aside the exempt property. *Harrington v. Smith*, 376.

39. LIEN OF ATTACHMENT NOT DESTROYED BY RELEASE OF PROPERTY ON FORTHCOMING BOND. — Under our statute the lien of an attachment is not destroyed by the delivery of attached property to the defendant upon the execution of a forthcoming bond. *Stevenson v. Palmer*, 563.

40. CREATION OF CORPORATION DE JURE. — A certificate of incorporation which provides that the corporate affairs shall be controlled by its president, vice-president and attorney, instead of providing for a board of directors or trustees, as required by statute, is insufficient to create a corporation *de jure*. *Bates v. Wilson*, 140.

41. WHO ESTOPPED TO RELY ON THE STATUTE. — One who has signed such certificate, has conveyed property to the company, and acted as one of its officers, is estopped from denying its *de facto* existence. *Ib.*

42. APPEALS IN FORCIBLE ENTRY AND DETAINER CASES. — Appeals to the supreme court in forcible entry and detainer cases are allowable only where the judgment appealed from amounts, exclusive of costs, to \$100, or relates to a franchise or freehold. *Crane v. Farmer*, 294.

43. DAMAGE BY ESCAPE OF WATER FROM IRRIGATING DITCH — STATUTORY LIABILITY OF OWNERS. — Where owners of an irrigating ditch recklessly attempted to convey a volume of water through it far beyond the reasonable capacity of the ditch safely to convey, and in so doing caused the ditch to overflow its banks, thereby flooding the land of an adjacent proprietor, and destroying his fruit trees and vines growing thereon, the defendants became liable to respond in damages under General Statutes, sections 312, 1728, 1733. *Greeley Irrigating Co. v. House*, 549.

STAY OF PROCEEDINGS: See APPEALS, 3; SUPERSEDEAS, 1, 2.

STREETS AND HIGHWAYS:

1. HIGHWAYS — ABUTTING OWNERS. — Where a land-owner has no fee in the land occupied as a highway, but his land abuts on it, and he has rights therein not shared in common with the general public for purposes of travel and use, a person using or appropriating such highway or a portion of it for other and different purposes than the one contemplated, whereby the highway is obstructed and impaired as a means of ingress and egress, is liable to the abutting owner for any consequential damages arising from such appropriation and use depreciating the value of the property. *Town of Longmont v. Parker*, 886.

2. WHAT IS NECESSARY TO CREATE AN EASEMENT IN STREETS AND ALLEYS. — Where the owner of a block in a city divides it into lots, with an alley in the rear, but files no plat, as required by the statutes in the case of a dedication, and the city does not accept the new arrangement, the purchaser of the alley-way at a sale for taxes takes it free from easement, and may close it. *Smith v. Griffin*, 429.

3. WHO NOT ENTITLED TO A WAY OF NECESSITY. — The purchaser of a city lot seventy-five feet deep, with a frontage of twenty-five feet on a street, is not entitled to a way by necessity to the rear of his lot over the adjacent land of his grantor. *Ib.*

SUNDAY:

KEEPING OPEN A TIPLING-HOUSE ON SUNDAY A CRIMINAL OFFENSE.— By the general law of the state the keeping open of a tipling-house on the Sabbath day or night is made a criminal offense, punishable by fine or imprisonment; and the fact that such house is situated in the city of Denver will not avail as a defense under the present city charter. *Heinssen v. State*, 228.

SUPERSEDEAS:

1. **CONTEMPT OF COURT — REFUSAL OF RECEIVER TO EXECUTE A DECREE APPEALED FROM.**— The taking and perfecting of an appeal under the act of 1885 (since repealed) by the filing of the bond required by section 23, page 354, from a decree dissolving a temporary injunction, and ordering the receiver to deliver over possession of the property involved to the persons entitled thereto under the decree, operated as a *supersedeas* and stay of process and proceedings as to every part of the decree. The trial court being thus ousted of all power to enforce it, the receiver was not in contempt for declining to execute it pending the appeal. *Hurd v. People*, 207.

2. **TRIAL BY COURT — MOTION FOR NEW TRIAL — BILL OF EXCEPTIONS.**— Where a trial is had to the court and its findings announced, an undetermined motion for a new trial operates to reserve the case and continue the jurisdiction beyond the term for the purpose of disposing of the motion and settling a bill of exceptions. *Stocking v. Morey*, 317.

3. **LIABILITY OF SURETIES ON APPEAL BOND.**— Unless the plaintiff in error, whose appeal has been dismissed, procures a *supersedeas* within thirty days from the dismissal of his appeal, the sureties upon his appeal undertaking become liable thereon as in case of affirmance. *McMichael v. Groves*, 540.

SUPREME COURT: See PRACTICE IN SUPREME COURT.

SUPREME COURT COMMISSION:

1. **SUPREME COURT COMMISSION — CONSTITUTIONALITY OF ACT PROVIDING — PETITION FOR REHEARING.**— The constitutionality of the legislative act providing for a supreme court commission is not necessarily involved upon the petition for a rehearing of a cause which had been referred to the commission in pursuance of said act. *De Votie v. McGerr*, 577.

2. **DISPOSITION OF COURTS IN REGARD TO DECIDING CONSTITUTIONAL QUESTIONS.**— Courts ordinarily decline to determine the constitutionality of legislative enactments in a case where the record presents some other and clear ground upon which the judgment may rest. *Ib.*

3. **THE SUPREME COURT NOT AUTHORIZED TO ADOPT, PRO FORMA, THE OPINIONS OF THE SUPREME COURT COMMISSIONERS.**— The supreme court alone can promulgate opinions and render judgments, and its duty is not discharged by the adoption *pro forma* of the conclusions of the supreme court commission. *Ib.*

SURETIES:

SURETIES NOT ENTITLED TO THE POSSESSION OF ATTACHED PROPERTY — REPLEVIN.— When the release of attached property has been procured by giving a forthcoming bond, the sureties upon such bond are not by reason of their suretyship entitled to the possession of the property, and cannot therefore maintain the action of replevin. *Stevenson v. Palmer*, 565.

SURPRISE:

UNEXPECTED EVIDENCE, WHEN A GROUND FOR NEW TRIAL.— When a party in the midst of a trial is taken unawares by the un-

SURPRISE — Continued.

expected admission of evidence, which, without fault on his part, he is not prepared to meet, by reason whereof his interests are greatly prejudiced, a case of surprise is presented which, if not otherwise remedied, may be made a ground of motion for a new trial. *Colorado M. Ry Co. v. Bowles*, 85.

TENANT IN COMMON: See **JOINT TENANTS AND TENANTS IN COMMON.**

TESTATOR AND TESTATRIX: See **WILLS.**

TIPPLING-HOUSES:

1. **AUTHORITY OF CITY COUNCIL OF DENVER TO LICENSE TIPPLING-HOUSES SUBJECT TO CONDITIONS.**—The authority of the city council of Denver to license, tax and regulate tippling-houses, dram-shops, etc., is subject to the following among other conditions: (1) That the license rate to be charged shall not be less than certain minimum fees specified by the statute. (2) That the power granted shall only be exercised subject to the general law of the state regulating the manner of conducting the business by the licensee. *Heinssen v. State*, 228.

2. **KEEPING OPEN TIPPLING-HOUSE ON SUNDAY — STAUTE APPLICABLE TO CITY OF DENVER UNDER PRESENT CHARTER.**—By the general law of the state the keeping open of a tippling-house on the Sabbath day or night is made a criminal offense, punishable by fine or imprisonment, and the fact that such house is situate in the city of Denver will not avail as a defense under the present city charter. *Id.*

TOWNS AND CITIES: See **MUNICIPAL CORPORATIONS.**

TRUSTS AND TRUSTEES:

1. **LEGAL STATUS OF MONEY IN THE HANDS OF A COLLECTOR OF TAXES.**—The right of election to treat money in the hands of a receiver of the public revenue as a simple contract debt, or as a trust fund, is with the municipality and not with the collecting officer. *Sauer v. Town of Nevada*, 54.

2. **CREATION OF TRUST ESTATES AND RIGHTS OF BENEFICIARIES.** The purchase of real estate in the names of two persons, to be held by them for the joint benefit of themselves and a third person, in pursuance of a contract by the terms of which all three were to contribute money and perform services toward the purchase and perfecting of the title thereto, charges the property with a trust in favor of said third person which cannot be arbitrarily discharged, but only by proceedings involving an accounting, settlement and adjustment of his rights in accordance with the terms of the contract. *Bates v. Wilson et al.* 140.

3. **LEGAL STATUS OF TRUST FUND ON DEATH OF TRUSTEE.**—A trust fund on death of the trustee remains such, though intermingled with other moneys, and does not become general assets of the estate of the trustee. *First Nat. Bank v. Hummel*, 259.

4. **THE ADMINISTRATION STATUTES HAVE NO APPLICATION TO SUCH A CASE.**—The case is not affected by the statutory provisions relating to wills and the administration of estates, for the reason that the fund in question never belonged to the deceased, and therefore constituted no part of his estate. The relation of debtor and creditor, as between the deceased and the payee of the draft, never having existed, the statutory provisions relating to the classification of claims against estates, and the order of their payment, have no application. *Id.*

TRUSTS AND TRUSTEES — Continued.

5. CREATION OF EXPRESS TRUST. — While it is essential to the creation of an express trust, in view of the statute of frauds, that it be in writing, yet a deed of realty absolute in form may be shown by clear and unequivocal parol proofs to be in effect a mortgage. An unacknowledged deed may be effectual in passing title to realty. *Armor v. Spalding*, 802.

UNAVOIDABLE ACCIDENT:

THE DEFENSE OF "UNAVOIDABLE ACCIDENT" DEFEATED BY EVIDENCE OF GROSS CARELESSNESS. — A defense based on unavoidable accident is not available where it clearly appears that the gross carelessness and negligence of the defendants contributed to the injury complained of. *Greeley Irrigating Co. v. House*, 549.

VENDOR AND PURCHASER:

JOINT CONTRACT FOR THE PURCHASE OF REAL ESTATE. — A joint contract for the purchase of real estate may exist whereby a beneficial interest will vest in all the contracting parties on the purchase thereof, regardless of performance on the part of each. *Bates v. Wilson*, 140.

VENUE:

CHANGE OF VENUE — PREJUDICE OF JUDGE. — It is no ground for a change of venue in a civil case that the judge had formerly represented the people as prosecuting attorney in a criminal prosecution against defendant, and had been counsel for the plaintiff in a civil suit against him. *Karcher v. Pearce*, 557.

WAIVER (see, also, ESTOPPEL):

1. WAIVING DEFECTS IN PLEADINGS. — A defect to verify pleadings, as required by the Civil Code, is waived when no objection is raised in the court below on account of the omission. *Nichols v. Jones*, 61.

2. MOTION TO DISMISS APPEAL NOT A GENERAL APPEARANCE. — A motion confined to the single object of dismissing an appeal cannot be considered a general appearance for all purposes, and a waiver of the defect relied upon. *Law v. Nelson*, 409.

3. ATTACHMENT AND SALE OF EXEMPT PERSONAL PROPERTY — DUTY OF OFFICERS. — It is the duty of a debtor having property in excess of the quantity covered by the exemption statute, if he has notice of a levy thereon, and is in position to do so, to interpose his claim of exemption. But when he has only the amount, kinds and value of property covered by the statute, a levy upon and sale thereof is absolutely illegal, unless the exemption be waived. In such case it is the duty of the officer to set aside the exempt property. *Harrington v. Smith*, 876.

1. WAIVER OF EXEMPTION RIGHTS. — Where the debtor was out of the state at the time of the levy, a letter to his creditor asking for a postponement of the case until he could "come down, and fix up everything satisfactory," but making no claim to exemption, was not a waiver of his exemption rights. *Id.*

5. APPEAL — OBJECTIONS NOT RAISED BELOW. — When there is sufficient legal evidence to support the judgment it cannot be disturbed upon appeal because joint and several demands were improperly commingled at the trial, no objection for this reason having been interposed. *Ayres v. Shields*, 475.

6. ILLEGITIMATE DEFENSE. — It is no defense to an action for delivery of title deeds, after payment and acceptance of the purchase money, that the contract of sale was not in writing and was there-

WAIVER — Continued.

fore void. One to whom the title papers have been intrusted for delivery to the purchaser can in no event interpose such a defense to the action. *Williams v. Carpenter*, 477.

7. **WAIVER OF OBJECTIONS — PRACTICE IN SUPREME COURT.**— When opposing counsel refrains from objecting at the time to improper argument, and the trial court afterwards refuses relief, reviewing tribunals, invoking a rule analogous to that of estoppel, frequently decline also to interfere. *Cook v. Doud*, 483.

8. **CONSEQUENCE OF FAILURE TO PLEAD THE STATUTE OF LIMITATIONS BELOW.**— The statute of limitations may be pleaded to any one of the items joined in a single count as distinct causes of action. It is therefore not a valid objection to a judgment in such case that the court, after the commencement of the trial, permitted the plaintiff to dismiss without prejudice his action as to all but two of the items declared upon, thus preventing the defendant from pleading the statute of limitations to the latter items, as he would have done had they been originally declared upon in this form. Such an objection could not be available in any case unless accompanied by a seasonable offer by the defendant to so amend his answer as to set up the statute as a defense. *Gilpin v. Adams*, 512.

9. **OBJECTIONS WAIVED.**— Objections for defect of parties must be raised by demurrer or answer, and if not so raised they are waived. *Fitzgerald v. Burke*, 559.

10. **FAILURE OF APPELLANT TO SERVE NOTICE WAIVED BY GENERAL APPEARANCE.**— A failure to serve notice of appeal from the county court to the district court as required by statute may be waived and cured by a full appearance in the district court by the appellee, and his participation in the action of the court in setting the cause down for trial *de novo*. *Robertson v. O'Reilly*, 441.

WATER RIGHTS: See IRRIGATION.**WAY OF NECESSITY:**

WHO NOT ENTITLED TO A WAY OF NECESSITY.— The purchaser of a city lot seventy-five feet deep, with a frontage of twenty-five feet on a street, is not entitled to a way of necessity to the rear of his lot over the adjacent land of his grantor. *Smith v. Griffin*, 429.

WILLS:

1. **THE FIRST PLACE TO PROBATE A WILL — EVIDENCE CONCERNING TESTATOR'S LAST DOMICILE.**— A will should first be admitted to probate in the jurisdiction of the testator's last domicile; but in admitting a will to probate the court must be presumed *prima facie* to base its adjudication respecting the last domicile upon sufficient evidence, and the probate and record thereof can only be questioned by some appellate or direct proceeding. *Corrigan v. Jones*, 311.

2. **LETTERS TESTAMENTARY OR OF ADMINISTRATION HAVE NO EXTRATERRITORIAL FORCE.**— The general rule is that letters testamentary or of administration have no extraterritorial force. When such letters have been duly granted in the jurisdiction of deceased's last domicile, they are the principal letters of authority, and those granted in other jurisdictions are ancillary. *Ib.*

3. **HOW A WILL MAY BE PROBATED WHICH WAS FIRST ADMITTED TO PROBATE IN A FOREIGN STATE — ISSUE OF LETTERS TESTAMENTARY.**— A will admitted to probate in another state in a court having jurisdiction of such matters is, on presentation of a duly certified copy of the record, entitled to probate and record in

WILLS — Continued.

this state, and letters testamentary or of administration may issue thereon as in other cases. *Ib.*

WITNESSES: See EVIDENCE.

WRITS:

1. **CERTIORARI FROM DISTRICT TO COUNTY COURTS.**— Compared with the district courts, the county courts are, in point of jurisdiction, inferior to, and their judgments and proceedings are subject to review by writs of *certiorari* from, the district courts, as provided by chapter 28 of the code. *In re Rogers*, 18.

2. **WHEN WRIT OF CERTIORARI IS PREMATURELY ISSUED IT WILL BE QUASHED.**— It is only the final determination of an inferior tribunal which can be reviewed upon a writ of *certiorari*. When it is sought to review thereby orders and proceedings in a cause preliminary to final judgment the writ will be quashed. *Schwarz v. County Court*, 44.

3. **WHEN WRIT OF MANDAMUS WILL LIE TO SUBORDINATE COURT, AND EXTENT OF ITS FUNCTIONS.**— The writ of *mandamus* may be used to command a subordinate court to proceed to judgment; but when the act to be done is of a judicial or discretionary character, the kind of order or judgment to be rendered cannot be thus controlled or directed. The writ cannot properly usurp the functions of a writ of error, or take the place of an appeal; nor will it lie against a subordinate court unless it be clearly shown that such court has refused to perform some manifest duty. *People ex rel. v. Rucker*, 396.

4. **DISMISSAL OF APPEAL WITHOUT PREJUDICE — LIABILITY OF SURETIES.**— On dismissal of an appeal without prejudice appellant is entitled to a writ of error at any time within three years, but unless a *supersedeas* be procured within thirty days after such dismissal the sureties upon the appeal bond become liable thereon as in case of affirmance of the judgment. *McMichael v. Groves*, 540.

5. **CORRECTING OFFICER'S RETURN AS TO DESCRIPTION OF ATTACHED PROPERTY.**— Amendments to the officer's return upon process to correspond with the fact, unless the party complaining has been deceived or misled to his prejudice, are liberally allowed. And when it appears that the notice of attachment upon realty, filed with the clerk and recorder, is correct, it is not error, on application supported by affidavits and notice to opposing counsel, to allow the sheriff to amend his return by correcting a misdescription of the realty attached. *McClure v. Smith*, 297.

WRIT OF ERROR (see, also, PRACTICE IN SUPREME COURT):

1. **LIABILITY OF SURETIES ON APPEAL BOND.**— Unless plaintiff in error procures his *supersedeas* within thirty days after the date of dismissal of his appeal, the sureties upon his appeal undertaking become liable thereon as in case of affirmance. *McMichael v. Groves*, 540.

2. **PRACTICE IN SUPREME COURT ON APPLICATION TO CORRECT THE RECORD BELOW.**— An application to correct the record in a cause pending before the supreme court does not lay the foundation for a new proceeding on error. When leave is given to apply in the court below for such correction, and the application is granted or refused, the proceedings thereon should be reported as an amendment to the transcript in the original cause. *Pleyte v. Pleyte*, 593.

7217 45

